THEODORE ROOSEVELT AMERICAN INN OF COURT

ARTICLE 81 GUARDIANSHIP

December 15, 2016
5:30 p.m.
Nassau County Bar Association

John M. Brickman, Esq.
Alice Jakyung Choi, Esq.
Hon. Arthur M. Diamond
Emily F. Franchina, Esq.
Terry E. Scheiner, Esq.
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OUTLINE OF PRESENTATION

Fact Pattern

Molly Mother is 91 years old and lives alone in her own home. She is very stubborn and fiercely independent. She has three children, two of whom live out of state and don't visit very often. Sam Son, the youngest of Molly Mother's children, lives near his mother and visits her with some regularity, has noticed that Molly Mother has begun to exhibit signs of confusion. Most recently, she was found wandering on Main Street soliciting shop owners for a ride to her hairdresser. The police picked her up and brought her to the local hospital which confirmed the diagnosis of dementia.

Molly Mother presents well initially. She still attends to her appearance and she can uphold her end of a conversation. Sam Son knows that though she presents well, she is no longer taking care of the house, and is slipping on her personal care as well. He has offered to assist her and she brushes him off, stating that he is very busy and she doesn't need any help. Sam's siblings don't believe that their mother is slipping and are not supporting Sam' attempts to intervene.

Finally, a friend refers Sam Son to an Elder Law attorney to explore bringing a Guardianship proceeding. Sam Son makes an appointment with Louise Lawyer, to discuss his options:

Cast

Molly Mother – AIP, Played by Harriet Steinberg
Sam Son – Son, Petitioner, Played by John Brickman
Louise Lawyer – Petitioner's Attorney, Played by Emily Franchina
Evie Evaluator - Court Evaluator, Played by Terry Scheiner
Zachary Zirconia – Justice, Supreme Court, Played by Hon. Arthur M. Diamond
Alice Attorney – Alice Attorney for AIP, Played by Alice Choi

THE PRESENTATION

Meeting with Attorney (8 mins)

Sam Son meets with Louise Lawyer and describes his concerns about his mother and the lack of help and support from his siblings. He describes the condition of the house, going into great detail about the condition of the house, the fact that Molly Mother refuses to hire someone to make repairs, and Molly Mother's denial that she has any

problems. Molly Mother has been adamant that she does not need anyone coming into her home to assist her. Sam Son has virtually no knowledge of Molly Mother's finances. Sam Son indicates that Molly Mother has a Will and a very limited Power of Attorney, but no Health Care Proxy.

Louise Lawyer suggests that this would be an appropriate situation for the bringing of an Article 81 Guardianship proceeding.

NARRATOR – Terry Scheiner (5 mins)

Background on Article 81 Guardianship statute
- 1992
- Replaced Conservator and Committee, Articles 77 and 78
- Designed for flexibility, tailored to the individual
- Least restrictive form of intervention
- Based on incapacities, not incompetence
- Awareness of limitations
- Substituted Judgment

Meeting with Attorney continued (7 mins)

Louise Lawyer explains the Article 81 process to Sam Son (Order to Show Cause, Verified Petition, court appointed Court Evaluator, hearing, Order and Judgment, 28 days for hearing) and confirms that Sam Son would like to be Molly Mother's guardian.

Sam Son leaves Louise Lawyer's office and comes back a week later to review and sign the Verified Petition.

Louise Lawyer gets the signed Order to Show Cause and serves it on the necessary individuals.

NARRATOR – Alice Choi (5 mins)

Role of the Court Evaluator – eyes and ears of the court, report, standards for appointing a guardian, 81.02

Court Evaluator receives the papers and visits Molly Mother (10 mins)

Evie Evaluator, the Court Evaluator, receives and reviews the Order to Show Cause with the Verified Petition and then sets up an appointment with Molly Mother .

Evie Evaluator meets with Molly Mother at her house. He asks Molly Mother if she was served with the Order to Show Cause and Petition and explains to her that he is the eyes and ears of the Court and that it is his job to make a recommendation to the Court as to whether or not she needs a Guardian. Molly Mother acknowledges receipt of the papers and says that she knows her son means well. Evie Evaluator finds her to be a charming elderly woman. She is a good conversationalist who tells him that her son is an alarmist – that she is quite capable of taking care of herself and her home. She offers Evie Evaluator a cup of tea – he declines.

Evie Evaluator notices that the house is quite cluttered. Molly Mother tells him that when you live somewhere as long as she has, you tend to accumulate a great deal of stuff. She further indicates that she had a cold the prior week so she was unable to clean up as she usually does and promised that the next time he comes back it will look much better. Molly Mother looks clean and well dressed. She convinces Evie Evaluator that her son is a Nervous Nelson and that she really is okay. Evie Evaluator asks if she wants an attorney to be appointed for her and she says that it is not necessary because she can speak to the Judge herself.

Court Appearance (5 mins)

When the parties arrived at court, the clerk called the case and the attorneys gave their appearances. Noticing that Molly Mother, though well dressed and well coiffed, was not dressed appropriately for the season (she was warmly dressed and it was a scorcher of a day), Judge Zachary Zirconia addressed Molly Mother directly and quickly picked up the signs of dementia. He then asked Molly Mother if she wanted an attorney – she said no, she doesn't need an attorney. Then he asked Molly if she would like her son to be her guardian. When she said "no" to her son being her Guardian, the Judge halted the hearing so as to appoint Alice Attorney and set it down three weeks hence.

Court Appointed Alice Attorney visits Molly Mother with Evie Evaluator (5 mins)

Alice Attorney visits Molly Mother in her home and explains the proceeding to her, including the fact that she, Alice Attorney, is there to represent Molly Mother in the proceeding. Molly Mother tells Alice Attorney that she is fine, that Sam Son is making a fuss over nothing, that he interfered enough when he got the doctor to tell her to stop driving, and that she wishes everyone would just leave her alone.

NARRATOR – John Brickman (15 mins)

Ethical consideration – how should Alice Attorney represent Molly Mother? Is it Alice Attorney's job to fight the guardianship if that is what Molly Mother wants, even if Alice Attorney thinks she needs a guardian?

Back in Court, Second hearing date (15 mins)

Alice Attorney makes a motion to strike the interaction between Molly Mother and the Judge that took place, on the record, at the first hearing.

Court hears testimony about incapacity

Evie Evaluator testifies.

NARRATOR - Justice Diamond (5 mins)

The awesome responsibility of deciding whether to take away someone's right to self-determination. Making a decision, respecting the rights of the AIP. Personal Needs, Property Management. Tailoring the powers of the Guardian.

NARRATOR - Harriet Steinberg (15 mins)

Use of mediation in Guardianship

NARRATOR – Emily Franchina (5 mins)

Some typical Guardianship case issues:

Elderly person never executed advance directives, and no longer has capacity
Elderly person thinks s/he does not need any help
Hoarding
Warring families
Other?

Materials

OSC
Verified Petition
Order and Judgment
Commission

CASES

Functional Limitation

Matter of Maher, 207 A.D.2d 133; 621 N.Y.S.2d 617 (2nd Dept., 1994) (Full case attached) No functional limitation found where AIP, who was himself an attorney, had become aphasic and partially paralyzed as result of a stroke. Court finds clear and convincing evidence establishing that AIP suffered from certain functional limitations in speaking and writing, but that he was not likely to suffer harm because he was capable of adequately understanding and appreciating nature and consequences of his disabilities as evidenced by his granting a power-of-attorney to colleague, and by his adding his wife as a signatory on certain of his bank accounts.

Proof of Incapacity

Matter of David C., 742 N.Y.S.2d 336; 294 A.D.2d 433 (2nd Dept., 2002) Appellate Division reverses order appointing guardian, holding that "a precarious housing situation and meager financial resources do not, without more, constitute proof of incapacity such that a guardian is warranted under Mental Hygiene Law §81.02."

Transfer to a Nursing Home – not least restrictive, but....

Matter of Joyce Z., NYLJ, 6/15/04 (Supreme Court, Nassau Cty.)(Asarch, J.) Although the IP had been surviving, albeit in a psychotic state, in a home that was barely habitable, Court finds that it is not financially feasible to maintain her home and that it would be the least restrictive alternative to expand powers of Special Guardian to full guardianship powers and to allow the guardian to place the IP into adult foster care, sell the IP's home to pay off all outstanding liens and place the funds into an SNT.

Limits on Guardian's Power to hospitalize or authorize Psychiatric Medications

Matter of Beth Israel Medical Center (Farbstein), 163 Misc.2d 26; 619 N.Y.S.2d 239 (Sup. Ct., NY Cty., 1994) Guardian for personal needs of IP with power to consent to or refuse routine and major medical treatment without IP's consent, cannot admit IP to hospital against wishes to receive psychiatric evaluation and administration of psychotropic medication. "Article 81 does not supersede Article 9."

In the Matter of Rhodanna C.B., 36 A.D.3d 106; 823 N.Y.S.2d 497 (2nd Dept 2006)
Appointment of a guardian with the authority to consent in perpetuity to the administration of psychotropic medication to the ward, over the ward's objection and without any further judicial review or approval, is inconsistent with the due process requirements of Rivers v. Katz,(67 N.Y.2d 485).

Substituted Judgment

Matter of Shah, 95 N.Y.2d 148; 711 N.Y.S.2d 824, 733 NE2d 1093, (2000); affirming, 257 A.D.2d 275; 694 N.Y.S.2d 82 (2nd Dept., 1999) (Full case attached)
Guardian (wife) allowed to transfer all of comatose IP husband's assets to herself to render IP Medicaid eligible and to maintain her support. Court makes it absolutely clear that a person should normally have absolute right to do anything that he wants to do with his assets, including giving those assets away to someone else "for any reason or for no reason." No agency of the government has any right to complain about fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is government itself which has established rule that poverty is prerequisite to receipt of government assistance in defraying of medical expenses. If competent, reasonable individual in position of IP would be likely to make such a transfer, under the same circumstances to insure that his care be paid by the State, as opposed to his family, then guardian can do it for him.

Clear and Convincing Evidence does not require Medical testimony

Matter of Ardelia R., 28 A.D.3d 485; 812 N.Y.S.2d 140 (2nd Dept 2006) (Full case attached)
AIP was properly found to be incapacitated. She was 82-years old, found in her home by APS without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately $115,000 in savings, she was delinquent on her utility bills. Based on these facts, the hearing record established by clear and convincing evidence that AIP lacked the understanding or appreciation of the nature and consequences of her functional limitations. Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition.

Matter of Rosa B., 1 A.D.3d 355; 767 N.Y.S.2d 33 (2nd Dept., 2003)
The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was

harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Least restrictive alternative/Deprivation of liberty

Matter of Ethyl P.B., 45 Misc.3d 1227(A); 5 N.Y.S.3d 327(Sup. Ct., Broome Cty., 2012) (Guy, ASCJ)

The AIP, a 90 year old woman suffering with progressive, short term memory loss, who acknowledged her need for assistance, expressed a preference for a community living arrangement with professional and home care assistance near her son that she had previously enjoyed as compared to a memory unit in an assisted living facility near her daughter where her daughter had placed her and she was then living. The court, noting her undisputed functional limitations and need for a guardian, and acknowledging the loving and caring relationship between the AIP and both of her adult children, ultimately appointed her son. Significantly, the court noted that although neither living situation was "risk free", the community living option did present greater risk to the AIP. The court, in a carefully nuanced decision, found that despite the somewhat greater risk, the AIP's health and safety would be adequately addressed by the community living option, that this was her "clear and consistently stated preference", that her son's plan did not expose the AIP to "undue or uncomprehending risk" and that therefore, on balance, appointment of her son would be more consistent with the objectives of Article 81. Finally, the Court directed that the daughter have access to all medical information and that her brother communicate with her regarding the AIP's care.

John M. Brickman, head of the litigation group at the Long Island of McLaughlin & Stern, LLP, practices primarily in the areas of commercial litigation and trusts and estates disputes. He has tried more than 100 cases before federal and state courts and arbitration tribunals, and has argued more than 100 appeals. He devotes particular attention to contract, corporate, partnership, trusts and estates, employment, intellectual property, unfair competition, civil racketeering, real estate, and construction cases, and frequently represents parties in disputes between principals of professional practices and substantial closely-held businesses.

Mr. Brickman was appointed a Commissioner of the New York State Commission on Legislative Ethics in July 2016. He served from 2007 to 2011 as a Commissioner of the New York State Commission on Public Integrity, the agency that enforced state lobbying and public employee ethics laws and regulations. He is a member of the Town of North Hempstead Working Group to revise the Town's Ethics Code. From 2005 to 2009, he was a Director of the Nassau Health Care Corporation, and from 2005 to 2008, he served as Chairman of the Correctional Association of New York, where he remains a Director. Until 2014, he was President and a Director of The Levitt Foundation, and he is Vice Chairman and a Director of the Long Island Medical Foundation. From 1992 to 1994, he served as a Trustee of The Johns Hopkins University and President of The Johns Hopkins Alumni Association.

Mr. Brickman is active in bar association, educational, and community activities. He is a member of the National Panel of Arbitrators of the American Arbitration Association. Annually, he chairs a Continuing Legal Education program on lawyers' ethics and civility, presented by the New York State Bar Association. From 1991 to 2006, he was Adjunct Professor of Law at Touro College, Jacob D. Fuchsberg Law Center, where he taught the course in Pre-Trial Litigation to senior law students. He writes and speaks regularly on legal ethics and public issues, including the administration of correctional and criminal justice agencies.

Mr. Brickman received his undergraduate degree from Johns Hopkins and his J.D. degree *cum laude* in 1969 from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar and Dean's List Scholar and served as Revision Editor of the *Columbia Journal of Law and Social Problems*. From 1971 to 1975, he served as Executive Director of the New York City Board of Correction, the agency of New York City government that oversees the operation of the New York City prison system and issues reports and recommendations for change. Before joining McLaughlin & Stern, he spent four decades as a partner of Ackerman, Levine, Cullen, Brickman & Limmer, LLP, of Great Neck, New York, where he led the litigation practice.

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November 2016

Alice Jakyung Choi
achoi@novicklawgroup.com

Alice holds a Bachelors and a Masters Degree in Consumer Science and is a candidate for a Doctorate Degree in Consumer Science. Alice earned her Juris Doctorate from Touro College, Jacob D. Fuchsberg Law Center where she graduated cum laude.

Throughout Law School Alice was the Managing Editor for the Law Journal of Race, Gender & Ethnicity. Her outstanding work was recognized in 2009 by the ABA/BNA when she was received an Award for Excellence in Intellectual Property, received the CALI award legal writing. She also participated in the Phillip C. Jessup International Law Moot Court Competition.During her time at Touro Law Center, Alice was the President of the Asian/Pacific American Law Students Association. She was a Research Assistant for Professor Douglas Scherer in the field of Employment Discrimination. Alice was appointed as Teaching Assistant for First-Year Legal Education Access Program (LEAP) Students.

Alice is admitted to the bar in the State of New York and New Jersey as well as the United State District Court for the Southern and Eastern District of New York and District Court of New Jersey.

Alice concentrates her practice in the field of Wills, Trusts and Estates, Estate Litigation, Probate and Administration.

Alice is a member of American Bar Association, New York State Bar Association, Suffolk County Bar Association, Nassau County Bar Association, and AmericanInn of Courts.

HON. ARTHUR M. DIAMOND

BIOGRAPHICAL DATA

Arthur M. Diamond has served on the NYS Supreme Court since January,2004.

Justice Diamond is a graduate of Rutgers University (New Brunswick 1974) and Hofstra University School of Law (1978). He began his legal career in the Office of the Nassau County District Attorney Denis Dillon where he spent eight years and served as Deputy Chief of the Trial Bureau. In 1992 he became of counsel to the Garden City law firm of *Fishkin & Pugach*, concentrating in the areas of criminal and personal injury law. In 1999 and 2000 he was appointed to the County Court by Gov. George Pataki.

His column, *Evidentially Speaking*, appears regularly in the Nassau Lawyer, the official publication of the Nassau County Bar Association. He has lectured on evidence at the Nassau County Bar Association, the New York State Bar Association, New York County Lawyers Association, the Statewide Judicial Seminars at the New York State Judicial Institute in White Plains, New York, the Second and Third Departments Attorney for the Child panels and the Hofstra University Continuing Legal Education Institute among others. He is co-editor of the Evidence chapter and a peer reviewer of the Article 81 chapter of the 2013 revision of the *Bench Book for Judges.*

In 2011 he was appointed by then Chief Judge Lippman to the statewide Judicial Advisory Council, a committee of Justices dedicated to improving trial practices in New York courts and in 2015 was appointed to the New York State Advisory Committee on Guardianship Matters. In January of 2016 he was appointed Supervising Judge of Guardianship matters for Nassau County.

FG

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Emily F. Franchina is a founding shareholder of the firm, Franchina & Giordano, P.C., an A.V. rated law firm. She is an A.V. rated lawyer and limits her practice to elder law, wills, trusts, estate planning, estate administration and adoption.

After graduating from the Maurice A. Deane School of Law at Hofstra University in 1989, Ms. Franchina immediately became involved in legal organizations centered on access to justice and community outreach. Her leadership began with the New York State Bar Association's Young Lawyers Section, a group that she chaired in 1998-1999. She chaired the general practice section for 2015-2016. Ms. Franchina has continued her involvement in the Association to the present day serving multiple terms as an appointed member of the Nominating Committee, Judicial Nominations Review Committee, House of Delegates, and as a Vice President of the 10th Judicial District. She is active in Section memberships relating to her areas of practice. She is the Chair of the Fellows of the New York Bar Foundation having served as a member of the board of directors.

A member of the Nassau County Bar Association, Ms. Franchina served on the Executive Committee from 2004 to 2011. She was the fifth female President in the Association's 107 year history and served in that capacity from 2009-2010. She is active in committees relating to her practice, the Nassau Academy of Law and WE CARE fund. In 2006, Ms. Franchina was honored with the distinguished service award by the WE CARE Fund, Inc, the charitable arm of the association.

Ms. Franchina's commitment to the community is evidenced by participation and membership in the Mineola-Garden City Rotary where served as President for 2014-2016, the Advisory Board of St. Johnland Nursing Home, and the Legal Advisory Board of the Long Island Alzheimer's Foundation (LIAF). She was appointed to the statewide committee on Access to Justice, the Advisory Committee to the Public Administrator, and Committee on Attorney Disciplinary Practice.

Emily F. Franchina was named one of Long Island's 50 Most Influential Women of 2008, 2010 and 2014. Ms. Franchina is the 2009 recipient of the Juliette Low Award of Distinction for the Girl Scouts of Nassau County, and the Annual Business Leadership Award for her volunteer activities from the Advancement for Commerce, Industry and Technology, (ACIT). Ms. Franchina was awarded the HERstory Award from Hofstra University in 2010, and she is the recipient of the Nassau County Women's Bar Association Courage Award, in 2011, and the Arthritis Foundation "Woman on the Move". In 2016 Ms. Franchina was named a New York Super Lawyer in the area of Elder Law. She has earned this award yearly since 2013.

Ms. Franchina's reported Guardianship cases include:
Matter of Mildred A., 21 Misc3d 1123A; 2008 N.Y. Misc. LEXIS 6349 (Sup. Ct., Nassau Cty.) (Asarch, J.); Matter of Rita R., 811 NYS2d 89; 26 AD3d 502 (2nd Dept. 2006) (Riordan, J); Matter of Harry G., 12 Misc. 3d 232; 820 NYS2d 426 (Sup. Ct., Nassau Cty., 2006) (Asarch, J.); S.I. and F.H., as Proposed Special Needs Guardians and Guardians ad Litem for their Disabled Brother, S.S., an incapacitated person v.R.S., as S.S.'s health care agent and South Nassau Communities Hospital, 24 Misc.3d 567, 877 N.Y.S.2d 860 (N.Y. Sup.Ct. 2009).

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Terry E. Scheiner is solo practitioner with an office in Port Washington who practices primarily in the areas of Elder Law and Guardianship. Prior to entering law school she was a Social Worker for fifteen years, working primarily in the field of mental health. Ms. Scheiner earned her undergraduate degree from SUNY Albany, her Masters of Social Work degree from Columbia University, and her law degree, summa cum laude, from Touro Law Center. She is a member of the New York State Bar Association, the National Association of Elder Law Attorneys, the Theodore Roosevelt Inn of Court, and the Nassau County Bar Association. She is also a past President of Yashar, the Judge's and Lawyers' Chapter of Hadassah, and Chairperson of the Conciliation Committee of the Nassau County Bar Association.

HARRIETTE M. STEINBERG, ESQ.

INTRODUCTION

Over the past thirty years, my professional experience has covered a range of legal areas from Family Law to Elder Law and Trust and Estates. I also offer Collaborative Law and Mediation services to resolve disputes in a non-litigational setting.

My clients benefit from my unique perspective that blends training and experience with skill and empathy. I am privileged to enjoy lasting relationships with many clients, their extended families and friends.

After fifteen years of practicing law, I learned about and quickly recognized the value of the alternative dispute resolution approach. Today, thanks to hundreds of hours of additional training and practice, I am fully committed to a non-litigational approach to dispute resolution.

PROFESSIONAL RESUME OF HARRIETTE M. STEINBERG, ESQ.

HARRIETTE M. STEINBERG received her Juris Doctor degree from Hofstra University in 1981 and has been admitted to practice before the U. S Supreme Court, Courts of the State of New York, U.S. Tax Court, U.S. District Court for the Eastern and Southern districts of New York. She is a member of the New York State Bar Association; Nassau County Bar Association; the National Academy of Elder Law Attorneys. She is a past Director of the Nassau County Bar Association, where she chaired the Elder Law, Social Services, and Health Advocacy Committee for the 1992 and 1993 terms and the Alternative Dispute Resolution Committee for 1999 and 2000 terms. She has also chaired the General Practice Section of the New York State Bar Association in 2007 - 2008.

Prior to becoming an attorney, Ms. Steinberg worked as a fiduciary accountant for the period 1969-1981 with the firms of Milbank, Tweed, Hadley & McCloy, Reed & Priest, and Mudge, Rose Guthrie and Alexander. Indeed, it was the Senior Partners of the foregoing law firms who supported her decision to pursue a legal career and her law school admission.

Ms. Steinberg has been an adjunct Professor at Hofstra University where she taught Aging, Public Policy and the Law to graduate students. She has been asked by fellow attorneys on many occasions to act of-counsel on matters pertaining to guardianship, trusts, estates, related tax matters and elder law throughout her career. Ms. Steinberg has lectured at the Nassau County Bar Association; Wurzweiler School of Social Work at Yeshiva University, New York City; Mercy League, West Hempstead, New York; National Business Institute, New York Institute of Technology, Old Westbury , New York; and at various seminars sponsored by the Nassau County Bar Association and the National Organization for Women.

NARRATIVE – ARTICLE 81

The Guardianship Statute, Article 81 of the Mental Hygiene Law, was enacted in July 1992, effective April 1, 1993, to replace Articles 77 and 78, the Conservator and Committee statutes, respectively. When enacted it was a progressive law that sought to protect the rights of incapacitated individuals by giving them the greatest amount of self-determination, independence and participation in making decisions for their lives.

Under the old Article 78, an individual was judicially determined to be "incompetent" permitting the Court to appoint a Committee for the person and/or property of the individual. The declaration of "incompetence" resulted in as total loss of a person's civil rights. Article 77, the Conservator statute, was enacted in 1972 and was intended to be a less restrictive alternative to the Committee, primarily with regard to property management, but instead, it created confusion and did not substantially accomplish its objectives.

In the late 1980's and early 1990's, Guardianship was a hot topic nationally. When NYS enacted Article 81 in 1992 it incorporated most of the principles laid out by the ABA House of Delegates in 1989 and those outlined in a proposed National Guardianship Rights Act which was never passed. Essentially, these principles were intended to safeguard the rights of the subjects of the statute, increase flexibility with regard to the powers granted to appointees, eliminate the conflicts between Articles 77 and 78, and provide for increased accountability of Court appointees. The two most dramatic changes were the focus on functional limitations rather than incompetence and the clearly defined procedural safeguards.

The need for a guardian under Article 81 is based on "Functional Limitations" and incapacity, not incompetence. The ward is called either an "Incapacitated Person" or a "Person in Need of a Guardian." Because the individual is not declared "incompetent" s/he does not automatically lose all decision-making powers. In order for a Court to appoint a guardian, the petitioner must prove that the appointment is necessary to provide for the personal needs or the property management of the individual, AND the individual must either consent to the appointment (in which case they will be called a Person in Need of a Guardian) or the Court must find, by clear and convincing evidence, that the individual is "likely to suffer harm because the person is unable to provide for personal needs and/or property management AND the person cannot adequately understand and appreciate the nature and consequences of such inability."

The person need not have a defined or "named" disability such as dementia or psychosis, thus medical records are usually not used in determining incapacity. Rather, the Court relies on clear and convincing evidence that the person is at risk of harm because s/he is not capable of taking care of him/herself properly. Evidence focuses on the person's ability to perform activities of daily living such as grooming, cleaning, eating, toileting,

and paying bills. Additionally, if a person recognizes that s/he needs assistance and takes action to put helpers in place, there may be no need for a guardian.

In some instances, there may be no formal disability, yet there is substantial evidence that the individual is unable to take care of his/her personal or property needs. Poor judgment alone is not a sufficient basis for a Court to appoint a guardian. There must be a combination of functional limitations that impair the ability to take care of oneself, a risk of harm, and either consent or the inability to understand and appreciate the consequences of the inability.

When applying to the Court for the appointment of the Guardian, the Petition should state what powers the Petitioner believes the Guardian must have to safeguard the individual. The powers sought should be narrowly tailored to the specific situation at hand. The Statute provides two lists of sample powers – Personal needs powers at 81.21 and property management powers at 81.22 – but these lists are merely suggestive. Ideally the Petition will list only those powers necessary to protect the individual from harm.

Article 81 also protects the rights of the individual by emphasizing that a guardianship proceeding should provide the "least restrictive form of intervention" which is sufficient to keep the person safe while simultaneously safeguarding their independence and right to self-determination. If the individual has the capacity to execute a Power of Attorney and a Health Care proxy, this may be preferable to the appointment of a guardian.

In addition to the appointment of guardians of the person or property or both, Article 81 has statutory provisions for the appointment of Temporary Guardians (81.23) and Special Guardians (81.16). A Temporary Guardian may be appointed at the commencement of a proceeding, in the Order to Show Cause, or at any subsequent stage of the proceeding prior to the appointment of a permanent guardian, upon a showing that the person is in danger of harm to their person or property in the reasonably foreseeable future. Likewise, the Guardianship Court has the power to issue injunctions and temporary restraining orders. A Special Guardian may be appointed when there are one or two specific tasks that must be accomplished for which the individual needs help and guidance, after which no guardian would be necessary. One example might be if there is a viable Power of Attorney and Health Care Proxy, but the Power of Attorney does not include gifting powers, the individual no longer has capacity to sign a new Power of Attorney, and the individual is in a nursing home and the transfer of assets for Medicaid planning purposes would be advisable. The Court could appoint a Special Guardian for the purpose of doing Medicaid planning, whose tenure would be terminated by the Court when the task is complete.

In keeping with the serious concerns about the liberty interests of persons for whom guardianships are sought, the statute includes many procedural safeguards, including, but not limited to: strict notice requirements that mandate the language of the notice and

require personal service upon the individual, plus service upon certain family members; the right to counsel if the there are to be any provisional remedies (such as the appointment of a Temporary Guardian or the issuance of a Temporary Restraining Order) and if the individual opposes the proceeding; a hearing which is to be scheduled within four weeks of the signing of the Order to Show Cause; and the appointment of a Court Evaluator whose responsibility it is to do an independent investigation and make a recommendation to the Court regarding the need for a guardian and the appropriate powers if a guardian is needed.

Finally, it is important to keep in mind that in 2000, the Court of Appeals explicitly confirmed the right of an Article 81 Guardian to use substituted judgment on behalf of the Incapacitated Person. Thus, if the Guardian seeks to take an action, such a engaging in Medicaid planning on behalf of the Incapacitated Person, if the action is one that a reasonable person in the same circumstance would likely pursue. Matter of Shah, 95 N.Y.2d 148

Inn of Court Presentation
Narrative

Before addressing the technical aspects of commencing an Article 81 guardianship proceeding, I must stress that most clients do not contact an attorney requesting such relief. Often clients contact attorneys with specific issues that require intervention such as an elderly individual's inability to to pay their bills or the fact that they have not paid bills. It might be the fact that their personal hygiene may have deteriorated and they are concerned about their health and safety. Perhaps a child who lives in another state has visited and noticed that they are parent has become a "collector" which is code for "hoarder". They may or may not have signed advanced directive such as powers of attorney or healthcare proxies. All of these issues are explored in an initial consultation with an interested party. An Article 81 guardianship proceeding is commenced by filing an Order to Show Cause and Verified Petition. An interested party is defined by Mental Hygiene Law statute Article 81.06: the alleged incapacitated person, a person entitled to share in the estate of an AIP, an executor or administrator of an estate in which the AIP is or maybe a beneficiary, any person with whom the AIP resides, a person otherwise concerned with the welfare of the AIP, or the CEO of a facility such as the nursing home hospital or assisted living.

The Order to Show Cause and Verified Petition must contain specific information, therefore, the meeting with the interested party is critical to gather and synthesize both personal and property information. Section 81.07 provides specific language that must be included in the Order to Show Cause including 12 point type and double spaced bold type. Section 81.08 provides that specific information must be included in the Verified Petition. That information includes a thorough explanation of the functional level of the a AIP, the reasons for the guardianship, the other alternative resources that have been explored, for example, advanced directive's such as powers of attorney, health care proxies or living wills. Also included in the Verified Petition are the particular powers that the petitioner is seeking, as well as their relationship to the functional level of the alleged incapacitated person. The proposed guardian must be named and the reasons why the proposed guardian is suitable should also be included in the Petition. It is important to note that the AIP may nominate an individual to serve as guardian or the petitioner may request that an independent individual serve as guardian.

Mental Hygiene Law section 81.07 requires that the hearing be scheduled 28 days from the signing of the Order to Show Cause. The Order to Show Cause shall include the date of the hearing, and the dates when service must be effectuated. The alleged incapacitated person must be personally served at least 14 days prior to the hearing. Court appointees, such as the court of evaluator, must be served three days from the signing of the Order to Show Cause. Other interested parties must be served at least 14 days prior to the hearing date. The Order to Show Cause will clearly specify the manner of Service and it is critical to comply with the direction of the court. Notice of the proceeding must be given to the spouse, parents, siblings and children of the incapacitated person and anyone with whom the AIP resides. In addition, nominated agents under a power of attorney or healthcare proxy also must receive notice. Any person or organization that has demonstrated a genuine interest in the well-being of the alleged incapacitated person must receive notice. A genuine interest is not defined under the statute but could include friends and neighbors. It is also appropriate to notice the local Department of Social Services in the event the individual is receiving Medicaid services. It is also appropriate to notice the CEO of the facility in which the alleged incapacitated person resides in the event that the AIP is living outside of their home. Examples include: a hospital, nursing home or assisted living. Also to be noticed is Mental Hygiene Legal Service if the alleged incapacitated person is in a mental hygiene facility. The court may direct other individuals be noticed and, once again, that direction should be followed precisely.

The Petitioner has the burden of proof in the guardianship proceeding and that burden of proof is clear and convincing evidence. The petitioner must be prepared to demonstrate and provide evidence to the Court as to the individual's functional limitations that impair their ability to handle their own affairs. In the event the petitioner fails to meet this burden, the petitioner may be responsible for the costs of the proceeding. The petitioner should be aware that the least restricted form of intervention is the ultimate goal of the guardianship hearing. The alleged incapacitated person has the right to be present in court or have their appearance waived if they are unable to meaningfully participate in the hearing.

Respectfully submitted,
Emily F. Franchina

The Court Evaluator

The Court appoints a Court Evaluator at the time of the issuance of the order to show cause. The appointment of a court evaluator is mandatory. One exception is if the court appoints counsel under MHL § 81.10, in which case the court may dispense with the appointment of a court evaluator or may vacate the appointment of a previously appointed court evaluator. The court evaluator helps to support the goals of Article 81 of assessing a person in terms of functional level and imposing the least restrictive dispositional alternative. The court evaluator is sometimes referred to as the "Eyes and Ears" of the Judge and acts as an independent investigator, gathering information to aid the court in reaching a determination about the person's capacity, the availability and reliability of alternative resources, the proper powers to be assigned the guardian, and selection of the guardian.

In choosing a Court Evaluator, the court considersthe unique challenges and needs that each case presents. The court may appoint as court evaluator any person registered with the office of court administration and who has knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the limitations the person is alleged to have. Such persons may include, but are not limited to, an attorney, physician, psychologist, accountant, social worker, or nurse.

Training Requirements of Court Evaluator

Mental Hygiene Law Section 81.40(a) provides that each incapacitated person is entitled to a court evaluator whom the court finds capable of performing the duties necessary to ensure that all the relevant information comes before the court and to assist the court in reaching a decision regarding the appointment of a guardian. As a result, each person appointed as an evaluator must first complete a training program approved by the chief administrator that covers the following:

1. The legal duties and responsibilities of the court evaluator;

2. The rights of the incapacitated person with emphasis on due process rights;

3. The available resources (e.g., visiting nurses, home health aides, adult day care, powers of attorney, and residential care facilities) to aid the incapacitated person;

4. An orientation to medical terminology, particularly relating to diagnostic and assessment procedures used to characterize impairment;

5. Entitlements; and

6. Psychological and social concerns of the disabled and frail older adults.

Duties of Court Evaluator

Mental Hygiene Law Section 81.09(c) provides that the duties of the court evaluator shall include:

1. Meeting, interviewing, and consulting with the alleged incapacitated person regarding the proceeding;

2. Determining whether the alleged incapacitated person understands English or only another language, and explaining to the alleged incapacitated person the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the person's rights, including the right to counsel;

3. Determining whether the alleged incapacitated person wishes legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed;

4. Interviewing the petitioner;

5. Investigating and making a written report and recommendations to the court, including the court evaluator's observations regarding the alleged incapacitated person's condition, affairs and situation; 102

6. Consulting with professionals having specialized knowledge in the area of the person's alleged incapacity;

7. Retaining an independent medical expert where the court finds it is appropriate;

8. Conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate; and

9. Attending all court proceedings and conferences.

*** An illustration of the duties of a court evaluator are provided in In re Hammons,164 Misc. 2d 609, 625 N.Y.S.2d 408 (Sup. Ct. Queens County 1995).

*** An example of inadequate investigations by a court evaluator: In re Wogelt, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1st Dep't 1996).

*** The court evaluator's conduct should not violate any of the standards of the Code of Judicial Conduct:

Additional Authority of Court Evaluator

1) Inspect Medical Records -- In re Goldfarb, 160 Misc. 2d 1036, 612 N.Y.S.2d 788 (Sup. Ct. Suffolk County 1994) .

2) Emergency Authority of Court Evaluator in Article 81 Guardianship Proceeding to Preserve Assets -- In re Wingate, 166 Misc. 2d 986, 637 N.Y.S.2d 1010 (Sup. Ct. Suffolk County 1996) .

Fee of Court Evaluator

If the judgment grants the petition for a guardian, the court may award the court evaluator a reasonable fee to be paid by the estate of the alleged incapacitated person. In contrast, if the judgment denies the petition for a guardian, the court may award the court evaluator a reasonable fee to be paid by the petitioner or by the allegedly incapacitated person, or in some proportion by both. If the alleged incapacitated person dies before a determination is made, a reasonable allowance may be awarded to the court evaluator, payable by the petitioner or by the decedent's estate, or by both in such proportions as the court may deem just.

In re Geer, 234 A.D.2d 939, 652 N.Y.S.2d 171 (4th Dep't 1996) (respondents could not be required to pay portion of evaluator's allowance upon denial of petition for guardianship); In re Pollack, N.Y.L.J., Sept. 27, 1996, at 31 (Sup. Ct. Nassau County) (allocating evaluator's fee between petitioner and alleged incapacitated person).

In re Chachkers, 159 Misc. 2d 912, 606 N.Y.S.2d 959 (Sup. Ct. New York County 1993).

In re Brice, 42 Misc. 3d 1231(A), 988 N.Y.S.2d 521 (Sup. Ct. Kings County 2014).

In re Crump, 230 A.D.2d 850, 646 N.Y.S.2d 825 (2d Dep't 1996).

In re Rennhack, N.Y.L.J., Jan. 6, 1998, at 23 (Sup. Ct. Nassau County).

ETHICAL ISSUES FOR COURT APPOINTED COUNSEL

The judge asks you to represent Molly Mother, an allegedly incapacitated person, who son has commenced a proceeding. Health care providers at the hospital have determined that Molly suffers from dementia, and the judge has similar concerns. So does her son. Molly wants you to fight the guardianship. What do you do?

What are the sources of guidance for us as ethical lawyers? Well, of course, we look first at the Rules of Professional Conduct, which have governed us ethically as New York lawyers since the changeover from the Code of Professional Responsibility in 2009. We also look to court decisions, and to opinions of ethics bodies of bar associations, which are persuasive but not binding.

What's the first question here? Who's your client? Molly? The Court? The son? That one, it seems to me, is fairly easy. The judge has appointed you to represent Molly Mother. You are her lawyer and she is your client.

What duties do you owe her? Ask yourself what duties you owe any client. Many, of course, and in this context several seem particularly relevant, if not problematic.

Rule 1.4 deals with communication. You need to keep the client promptly informed of things, you have to consult reasonably with her about the means by which her objectives are to be accomplished (put an asterisk next to that one), and you must

explain things to her to the extent reasonably necessary to let her make informed decisions regarding the representation.

But we've just reminded ourselves that Molly Mother seems to have dementia. The rules help us there. We look to Rule 1.14, entitled "Client with diminished capacity." Subsection (a) tells us that when a client has diminished capacity to make adequately considered decisions, we still, "as far as reasonably possible, [must] maintain a conventional relationship with the client."

But here, that doesn't necessarily help us resolve the troubling question -- after Molly tells us that she doesn't need or want a guardian, is our responsibility as Molly's lawyer simply to fight the guardianship -- namely, to achieve her objective -- although we have a reasonable sense of trouble down the road? Let's look to Rule 1.14(b) --"when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." So if we think it's necessary to protect her, as a matter of ethics we have the right to seek the appointment of a guardian for Molly. Doesn't that mean that there may be circumstances in which, although we are her lawyer in a proceeding brought by a third party, we might acquiesce in the appointment of a fiduciary for Molly Mother?

But you have other duties that you must continue to perform. Rule 1.6 deals with our obligations of confidentiality, whether attorney-client protected information or client confidences **[explore difference if necessary]**. Rule 1.14, in a provision that deals directly with clients of diminished capacity, tells us in Subsection (c) that information regarding that client remains protected by Rule 1.6. But it says that if you take action to protect the client under the previous subsection (b), you are authorized impliedly to reveal information about the client, but "only to the extent reasonably necessary to protect the client's interests."

What if the client instructs you not to reveal confidences? Although the rule doesn't speak directly to that dilemma, comments prepared by the State Bar in anticipation of the adoption of the Rules of Professional conduct recognize that, in bringing a guardianship proceeding, "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary." [NY St Bar Assn, Proposed Rules of Professional Conduct rule 1.14, Comment 8 ("Disclosure of the Client's Condition.")]

Remember that you can take protective action under Subsection (b) only if you reasonably believe that the client has diminished capacity, the client is at risk of substantial physical, financial or other harm in the absence of action, and the client can't adequately act in the client's own interest.

How do we make the determination of this critical threshold? We are lawyers, not geriatricians, psychiatrists, or social workers. Let me suggest to you that the short answer is very carefully. You have the right to protect yourself when you make that decision. What do you look to? Common sense can provide a lot, if not all, of the answer. Your own observations of the client, in light of your experience. How does the client look? Act? Does the client's speech make sense? Not just the client's immediate commentary, but over the period of time you spend with the client -- remember that people with dementia initially may well will appear fully enabled, with the impairment becoming apparent only after you spend some time with them. You have an obligation to do just that. What do others that are close to the client tell you, particularly people who don't seem to have an interest in the outcome --- friends, relatives who wouldn't take in intestacy or under a will, caretakers, neighbors, other professionals, and certainly health care providers, especially those who have treated the client over a period of time. Try to look at documents -- has the client signed anything recently? Ask to see the client's bank statements or checkbook -- do you pick up payments or expenses that seem out of the ordinary, or as if someone is taking advantage of the client? Again, common sense goes a long way.

We get some additional guidance from the State Bar analysis of the Rule, again written in anticipation of the adoption of the Rules of Professional Conduct: The relevant Comment provides: "Seeking a guardian without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a

client's diminished [***22] capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so." [NY St Bar Assn, Proposed Rules of Professional Conduct rule 1.14, Comment 7.] That, of course, suggests the appropriateness of the lawyer supporting the third party's petition.

NARRATIVE - JUDGE

Of all the varied subject matter jurisdiction of the Supreme Court, the powers given to an Article 81 judge are indeed awesome. The exercise of raw judicial power can readily be found in other places in our law. For example, the Domestic Relations Law gives us the power to take or give custody of children from one spouse to another; in Article 9, which allows for the involuntary commitment and retention of the mentally ill against their will; in the treatment over objection allowed for in14 NYCRR27.8 and the forcible giving of psychotropic drugs pursuant to *Rivers v. Katz 67 NY2d 485*- these are all examples of the vast authority that judges have in these cases. The power given to us pursuant to Article 81 is, in my opinion, equal to any of them.

As you have heard, the statute presents a very unusual construct. While it is a civil proceeding, the statutory authority is rife with 5th and 14th Amendment implications. We may commit an IP to a nursing home for life, take their property, and sell their home-awesome power indeed! While technically speaking constitutional protections may not apply as in criminal cases, case law has established that the AIP may not be forced to become a witness against their own interest, even if that result may be at odds with the statute's expressed purpose- protecting the best interest's of the subject. As Daniel Fish has written, the statute appears to be at war with itself.

Many of our cases do not present difficult choices. Those who are suffering with various degrees of dementia and Alzheimer's disease clearly lack capacity and are found so without hesitation. But it is the people who are more gray area- like Molly, who present the more difficult challenges. She is of a type who was at pleasure at first sight. Amazing looking at 93, she wore a suit, her hair was done, she wore make up. When I met her she was smiling, coming to court with her petitioner-son and his wife, and the son's attorney. When I asked her if she knew why she was here, she smiled and said 'my son thinks I need help, but I don't, I'm fine.' She then proceeded to tell me that she loved me, my court reporter, court clerk and everyone else in the room. She then went and shook their hands. At this point, I stopped the proceeding and told her I was going to assign her a lawyer who would come back with her in a few weeks.

Fortunately, Molly would not need much convincing to accept the guardianship. But many resist with every fiber of their being. If someone can engage in a conversation or debate with me, and their attorney allows it, I will talk to them in the courtroom on the record. After hearing them out I will then do what

I believe is in their best interest, what will, above all, keep them safe in their environment. Where do I draw the line? Hopefully an example will provide guidance.

An 86 year old who lives in her home in Long Beach was the subject of a proceeding brought by her daughter who lives in Pennsylvania and wanted to move her mother to an assisted living facility near her. The mother was steadfast in her refusal. The daughter said her mother was an accident waiting to happen. That she had no aides overnight-only during the day- because she did not think she needed any when she went to sleep. I begged, cajoled, yelled but nothing worked. Her answers made sense. She had never fallen. She accepted help during the day. I did not find her incapacitated. Her daughter was unhappy with me. I explained to the petitioner that before I effectively take away the liberty of a person like your mother she has earned the right to fail, the right to prove me wrong. Guardianship should be a last resort, not a preventative. I let her go home and dismissed the petition. She lasted four more years in her home before she passed away.

There are many other stories such as this, all of varying degrees of difficulty. But the test remains the same for all of them: what degree of intervention is necessary to protect the subject from harm while maintaining their independence and dignity.

CASES

1.Burden is on petitioner to prove incapacity by clear and convincing evidence. Matter of Maher , 207 A.D.2d 133, 621 N.Y.S.2d 617 (2d Dep't 1994).

2. Rules of evidence may be waived by the court if good cause is shown. AIP's patient privilege is waived if AIP affirmatively places medical condition in issue. In re Marie H. ., 25 A.D.3d 704, 811 N.Y.S.2d 708 (2d Dep't 2006).

3.Court evaluator must testify and be subject to cross-examination if report is to be admitted in evidence. Report of court evaluator cannot be introduced into evidence without testimony from court evaluator. Matter of Maher, 207 A.D.2d 133, 621 N.Y.S.2d 617 (2d Dep't 1994).

4. Jury to determine facts if jury demand made prior to return date of Order to Show Cause . MHL 81.11 (f)

5. Medical testimony is not required. Matter of Harriet R., 224 A.D.2d 625, 639 N.Y.S.2d 390 (2d Dep't 1996).

6. Court evaluator may testify "to aid the court... to understand the facts and circumstances and to makje recommendations to the court," In re Lee I, 265 A.D.2d 750, 697 N.Y.S.2d 385 (3d Dep't 1999).

DECEMBER 15, 2016
THEODORE ROOSEVELT AMERICAN INN OF COURT

PANEL COMMENTS - RE: MEDIATION IN GUARDIANSHIP
By: Harriette M. Steinberg, Attorney-Mediator

My comments, in the next five minutes, are intended to introduce the concept of mediation to the guardianship arena.

Mediation is a non-litigational tool that can be used creatively to either avoid the necessity of a guardianship proceeding or to address some of the issues that arise when our seniors and others face functional limitations.

Mediation is often described as a voluntary, non-judicial process by which an impartial neutral (the mediator) assists the parties and their counsel in resolving legal and emotional issues, without resorting to traditional litigation.

Clients who are dealing with potential guardianship issues would be well served by their counsel, to be introduced to the mediation process as part of the legal strategy used in resolving the issues presented by their case.

Mediation may be appropriate in the pre-petition and initial petition stages as well as during the guardianship period and subsequent to the termination of the guardianship arrangement.

Pre-Petition Stage

This is the period that is the beginning of an AIP's diminishing capacity (e.g., forgetfulness, behavior changes). It is the period that the need for assistance for the AIP begins and when family members and friends first become aware of the need for coping with the AIP's changing state. And, it is the time when the "seeds of discontent" are planted, ie., son has his name added to mom's checking account; daughter becomes suspicious, or, alternatively, daughter, who is health care agent, acts and then mom, who is becoming paranoid, accuses her of an intent to harm. This is where familial suspicions grow into hostilities which lead to the next stage.

Petition Stage

The filing of the guardianship petition raises both legal and emotional issues. Disputes can erupt between mother and her children as to whether she needs a guardian, or between family and friends as to who should be the guardian and whether a guardianship or other advance directives can be used as less restrictive alternatives. If mediation is used during this stage, many of the disputes that surround the appointment of a guardian can be resolved. The parties might even be able to devise a framework that will make the imposition of a guardianship unnecessary.

Ongoing Issues During Guardianship

To be sure, the appointment of a guardian rarely resolves the conflicts that arise during the actual guardianship. Sometimes it is family members that are raising disputes within each other; other times, family have issues with the guardian's decisions. Mediation during this stage can avoid costly litigation and redress to the guardianship judge.

Termination of Guardianship

Death triggers the termination of the guardianship. At this time, there are many disputes that arise that no one wanted to raise while the incapacitated person was alive. Mediation at this point is the alternative to subsequent litigation in the Surrogate's Court.

Counsel should seek the services of mediators to assist with an entire case, if appropriate, or portions of a potential contest and thus avoid a heightening of the emotional conflicts that emerge in many contested guardianship cases and which cause permanent damage to relationships.

Mediation is beginning to become more recognized in our communities and should be considered by counsel when dealing with their future matters. Attached is a recent article that I co-authored regarding the efficacy of a mediation-centered approach to a post-death dispute that ultimately was exposed to Surrogate's Court litigation.

Using Mediation to Resolve a Will Contest (Maybe Even Before It Happens)

by Harriette M. Steinberg and Elizabeth P. Donlon

To get an idea of how much litigation is taking place in the Nassau County Surrogate's Court, one might take a look at the Court's monthly caseload activity reports. For the period August 2014 through July 2015, these reports reflect that Surrogate Edward W. McCarty III commenced 271 trials or hearings, with all but 33 cases being uncontested. The more telling statistic is that 119 pending disputes cases were reported as having been settled during that same 12-month time period.

Although it is clear from the compiled data that many, if not most, Surrogate's Court disputes are settled before trial, the statistics do not reveal *how* or *when* a pending case is settled. Practitioners know that a will contest almost always ends with the attorneys for the proponent and the objectant negotiating a compromise agreement, usually after years of extensive motion practice and discovery, and probably at the pre-trial conference on the eve of a trial. Sometimes a settlement is reached, simply because one or both sides have run out of money or "steam."

This article is intended to explain how litigators can use an alternative dispute resolution (ADR) process – mediation – in settling such a dispute. It also suggests that transactional counsel consider mediation as an estate planning tool in resolving a potential conflict before a will contest ensues.

Mediation Focuses on Interests, Not Positions

There's a common notion that the court attorney assigned to the case acts as a mediator during court conferences. So what is the benefit of seeking outside mediation to help settle a will contest?

Nassau County Surrogate's Court Chief Court Attorney Andrew L. Martin explains that, although conferences with a court attorney or law secretary share some characteristics of mediation, court personnel could never devote the same time and attention as a mediator in helping to resolve a dispute. Also, a court attorney's method is usually evaluative. As Mr. Martin explains:

> "In the evaluative process, similar to the adjudicative process, the parties and their attorneys prepare and present a case, though typically much more informally, to a third party neutral. Unlike an arbitration proceeding,

> however, the neutral does not render a binding decision determining the winner. Rather, the neutral will evaluate the strength and weaknesses in each party's case and may offer an assessment of the respective parties' likelihood of success at trial. This is most like the pretrial conference with a court attorney with which many Surrogate's Court practitioners are familiar...."

Unlike court attorneys, mediators in Surrogate's Court disputes are more likely to use a *facilitative* approach in the mediation process. In order to understand the legal dispute, the mediator will often ask the parties' attorneys to provide the pleadings and a confidential mediation statement in which they brief their positions.

But the focus in mediation is not on the legal arguments. Instead, the emphasis is on the parties' interests and how those interests can be integrated into an agreement that both sides can live with. As Mr. Martin puts it, "with the help and encouragement of the neutral, the resolution of the dispute is determined by the parties, not by a judge, jury, or arbitrator. There is no winner or loser. This is mediation."

Settling a Will Contest Through Mediation

Will contests often involve the subjective perspectives of the parties, which are sometimes distorted by such emotional underpinnings as anger, jealousy, frustration and sibling rivalry. When tested against the evidentiary standards of a formal court proceeding, these perspectives may get in the way of what is required to support the contestants' claims.

A recent Nassau County Surrogate's decision illustrates the dynamics of such a dispute. The decedent, a 69-year old attorney, excluded his two adult children of his first marriage and left his entire estate to his second wife and their then four-year-old daughter. The adult son and daughter raised the usual objections: improper execution, lack of testamentary capacity, undue influence, and fraud. The proponent moved for summary judgment, and was successful. The Court's decision is instructive as to the necessary evidentiary levels needed to defeat the proffered Will, and is equally instructive as to how both sides may very well have reached a better outcome – through the mediation process.

The bases for the objectants' claims, although real to them, were found to be insufficient as a matter of law to defeat the testator's estate plan. Undoubtedly, the decedent's adult children experienced strong emotional reactions to their father's decision to eliminate them from sharing in his estate. While it could be said that engaging in litigation "legitimized" the children's perspectives by allowing them to proceed for a time as

objectants in a will contest, their legal arguments and their case failed, along with whatever possibility there may have been for a relationship between the decedent's "first family" and his "second family."

It is far more sensible to use a mediation process in such situations. Rather than promoting distorted realities, as litigation sometimes does, mediation allows the parties to express their feelings, and often assists the parties in understanding the other side's point of view. This aspect of conflict resolution is a unique feature of mediation. The experience of sharing one's perspective and "feeling heard" can often help people bring closure and move toward settlement. The process also allows parties' real interests to be identified and channeled constructively toward resolution of their conflict. In short, the participants in the mediation process have an opportunity to "speak their piece" and, maybe for the first time in many years, to hear and to listen to what the other side has to say.

In a Surrogate's Court dispute, where the emotional components regularly surpass the financial aspects of the case, mediation is particularly appropriate. Aside from the chance to resolve a dispute before the parties exhaust their resources and their mental health, the mediation process provides for an added dimension: it gives the *parties* an opportunity to express themselves in a neutral setting.

Although the mediator is not a judge and the mediation session does not take place in a courtroom, sometimes the parties feel that mediation gives them what is akin to their "day in court." This opportunity also extends to counsel for the parties, who have a unique opportunity to present their case directly to the "other side." Through the mediation process, the participants may even learn that, when all is said and done, they have similar interests and objectives or, at the very least, that there's room for further discussion.

Creative resolutions cannot be obtained when the parties and their attorneys are strictly in "litigation mode." Although, stripped of its emotional underpinnings, the conflict in many Will contests *is* about the money, resolution of the dispute need not be just about a "redistribution" of the decedent's estate. Rather than starting the discussion with estimates of the costs of continued litigation or of the likelihood of success at trial, mediation offers a forum for the parties and their counsel to have an opportunity to formulate their own resolution of the conflict. A mediated settlement can take a myriad of forms – from an actual division of assets to the creation of future interests, and may include non-pecuniary considerations, which may be of significant value to the parties.

Mediation During the Planning Process

The facts of the *Sanger* case also suggest an important overlooked opportunity. As noted in the Court's decision, a draft of the Will was inadvertently sent to the decedent's son who, in response, wrote a letter to his father in which he expressed his concern that the documents did not actually reflect his father's wishes. In addition, the decedent's wife had admitted in her deposition that she had not agreed with her husband's decision to exclude his adult children.

Had someone raised the possibility of mediation to deal with what was sure to escalate into a post-mortem legal conflict during the estate planning process, the parties may have had an opportunity to address the adult children's interests and the testator's concerns for the financial security of his spouse and young child without incurring the cost of permanent familial discord, which undoubtedly was the ultimate price paid by the parties in this case.

In *Sanger*, the disclosure of the testator's testamentary plans – although unintentional – could have been used as the linchpin for conflict resolution. Indeed, the Court itself entertained this idea: "If the decedent, arguendo, felt at all pressured to take Stacie and Warren Jr. out of his estate planning, this entreaty from his son a few months post-execution would afford the perfect opportunity for reflection and change."

Certainly, the testator would have wanted to spare his second family the financial and emotional burdens of litigation. Addressing the conflict by using a professional trained in this area could have provided the testator with the tools to create such an opportunity for his entire family. This approach may be new for estate planning counsel, but it is one that should not be overlooked.

Mediating Disputes: Do It Early and Often

Mediation represents a growing legal and social change that should be embraced by attorneys to serve their client's interests. As this article demonstrates, using the mediation process to attempt to resolve a potential conflict before it "ripens" into a will contest or, at least, early on in a post-mortem legal dispute, is far better than enduring what may be years of litigation only to eventually settle anyway.

Nassau County Surrogate's Court's caseload activity reports for August 2014 through July 2015, courtesy of Chief Clerk Michael Murphy.

Calendar Clerk Kathy Moran reports that the vast majority are uncontested SCPA Article 17A guardianship hearings.

Although there's no space to enter them on the official OCA reporting form (USC 150), the Calendar Clerk also keeps tracks and reports to the Court on how many contested matters are settled.

Andrew L. Martin, "Mediating Disputes in the Surrogate's Court," Warren's Heaton, Legislative and Case Digest, June 2014.

Id.

In re Will of Sanger, 45 Misc.3d 246, 991, N.Y.S.2d 251.

The evidence indicates that the attorney-draftsman suggested that the son speak to his father directly, but there is no indication that the son did so. Instead, the situation festered for almost seven years.

At an IAS Part , of the Supreme Court of the State of New York held in the County of Nassau, in the Supreme Court Building, Mineola, New York, on the _____ day of _____ 2016.

PRESENT:
Hon. ZACHARY ZIRCONIA
Justice

In the Matter of the Application of SAM, for the Appointment of a Guardian of

MOLLY,

an Alleged Incapacitated Person

ORDER TO SHOW CAUSE TO APPOINT GUARDIAN

Index No. 123456789-I-2016

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY SAM SON WHO BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR FINANCIAL AFFAIRS. SAM SON IS ASKING THAT SOMEONE BE APPOINTED TO MAKE DECISIONS FOR YOU. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY SAM SON BELIEVES YOU MAY BE UNABLE TO TAKE CARE OF YOUR FINANCIAL AFFAIRS. BEFORE THE COURT MAKES THE APPOINTMENT OF SOMEONE TO MAKE DECISIONS FOR YOU, THE COURT HOLDS A HEARING AT WHICH YOU ARE ENTITLED TO BE PRESENT AND TO TELL THE JUDGE IF YOU DO NOT WANT ANYONE APPOINTED. THIS PAPER TELLS YOU WHEN THE COURT HEARING WILL TAKE PLACE. IF YOU DO NOT APPEAR IN COURT, YOUR RIGHTS MAY BE SERIOUSLY AFFECTED.

YOU HAVE THE RIGHT TO DEMAND A TRIAL BY JURY. YOU MUST TELL THE COURT IF YOU WISH TO HAVE A TRIAL BY JURY. IF YOU DO NOT TELL THE COURT, THE HEARING WILL BE CONDUCTED WITHOUT A JURY. THE

NAME, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:

GUARDIANSHIP CLERK
100 SUPREME COURT DRIVE, ROOM 152
MINEOLA, NY 11501
Telephone No.: (516) 493-3121

THE COURT HAS APPOINTED A COURT EVALUATOR TO EXPLAIN THIS PROCEEDING TO YOU AND INVESTIGATE THE CLAIMS MADE IN THE APPLICATION. THE COURT MAY GIVE THE COURT EVALUATOR PERMISSION TO INSPECT YOUR MEDICAL, PSYCHOLOGICAL OR PSYCHIATRIC RECORDS. YOU HAVE THE RIGHT TO TELL THE JUDGE IF YOU DO NOT WANT THE COURT EVALUATOR TO BE GIVEN THAT PERMISSION.

THE COURT EVALUATOR'S NAME, ADDRESS AND TELEPHONE NUMBER ARE:

Name: EVIE EVALUATOR

Address: _____

_____

Phone: _____

YOU ARE ENTITLED TO HAVE A LAWYER OF YOUR CHOICE REPRESENT YOU. IF YOU WANT THE COURT TO APPOINT A LAWYER TO HELP YOU AND REPRESENT YOU, THE COURT WILL APPOINT A LAWYER FOR YOU. YOU WILL BE REQUIRED TO PAY THAT LAWYER UNLESS YOU DO NOT HAVE THE MONEY TO DO SO. YOU HAVE THE RIGHT TO PRESENT EVIDENCE, CALL

WITNESSES, AND EXPERT WITNESSES, AND CROSS-EXAMINE WITNESSES, INCLUDING WITNESSES CALLED BY THE COURT.

On reading and filing the annexed Petition of SAM SON, duly verified on the __ day of _____, 2016, from which it appears that MOLLY MOTHER, an alleged incapacitated person above named, resides at 123 Sesame Street, in Nassau County, and is likely to suffer harm because: the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability; and it appearing that the said alleged incapacitated person owns or possesses certain property within the State of New York,

LET MOLLY, the Alleged Incapacitated Person; SAM SON; and the Court Evaluator Appointed herein,

SHOW CAUSE before the Hon. Zachary Zirconia the Justice presiding at IAS Part_____, of this Court, to be held in the County of Nassau, at the Supreme Court Building, 100 Supreme Court Drive, ____ floor, Mineola, New York 11501 on the _____ day of _____ 2016, at _____ A.M./P.M., of that day, or as soon thereafter as counsel can be heard.

WHY a guardian should not be appointed for the Alleged Incapacitated Person, within the State of New York, upon his/her qualifying in accordance with the statutes of the State of New York in such cases made and provided to exercise one or more of the following powers as set forth in Mental Hygiene Law §81.21, with relation to property management, and §81.22, with relation to personal needs management of the Mental Hygiene Law;

PROPERTY POWERS BEING SOUGHT

The Petitioner is requesting that, as the least restrictive form of intervention necessary to assist the Alleged Incapacitated Person in providing for her property needs, the proposed Guardian be given the power to:

(1) marshal the income and assets of MOLLY MOTHER, and establish bank, brokerage and other similar accounts in the name of the Guardian for MOLLY and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of MOLLY MOTHER, including, but not limited to, government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL § 11-2.2; inventory personal belongings, and store or dispose, as appropriate;

(2) marshal accounts held jointly in the name of MOLLY MOTHER and others, without the consent of the listed joint tenant(s), provided that the Social Security number of MOLLY MOTHER has been used to report dividends from the asset to tax authorities;

(3) close or retitle in the Guardian's name, as Guardian, bank time deposits prior to maturity, upon the finding by this Court that, for purposes of § 9-I and § 238 of the Banking Law, the Order Appointing a Guardian shall be deemed a declaration of incompetence and no banking or savings institution shall impose any penalty upon the transaction;

(4) provide for the maintenance and support of MOLLY MOTHER;

(5) sell MOLLY MOTHER's residence, at 123 Sesame Street, subject to the approval of this Court;

(6) make gifts, subject to prior court approval, except that no prior approval shall be required if gifts to an individual do not exceed $500 in the calendar year and all gifts to all individuals do not exceed the lesser of 5% of all liquid assets in the guardianship account or $10,000;

(7) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

(8) enter into contracts;

(9) create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of MOLLY MOTHER;

(10) exercise options to purchase securities or other property;

(11) change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

(12) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with EPTL 2-1.11(c);

(13) authorize access to or release of confidential records;

(14) apply for, obtain and settle claims for government benefits;

(15) arrange and pay for health care services, health care aides and household help;

(16) lease a primary residence for up to 3 years;

(17) defend or maintain civil proceedings on behalf of MOLLY MOTHER;

(18) retain attorneys, accountants and similar professionals, subject to prior Court approval and with payment subject to the approval of this Court;

(19) sign and file income tax returns and all other tax documents for any and all tax obligations, and appear before federal, state and local taxing authorities on all claims, litigation, settlements and other related matters;

(20) deal with all pension, retirement, incentive, IRA/Keogh/SEP and similar plans, programs and annuities;

(21) borrow funds to avoid forced liquidation of MOLLY MOTHER's assets;

(22) engage in Medicaid and estate planning, subject to prior court approval of all proposed transfers, pursuant to MHL § 81.21 (b);

(23) take actions required to make MOLLY MOTHER eligible for Medicaid;

(24) deal with Medicare and Medicaid claims, litigation and settlement;

(25) establish an irrevocable prepaid funeral plan in accordance with Medicaid regulations;

(26) pay reasonable funeral expenses out of any funds remaining in the guardianship account at death, to the extent that a prepaid funeral plan, if any, is insufficient to do so;

(27) pay bills after death if such debts were incurred before death, and if authority to pay such bills would otherwise have existed;

(28) settle and compromise a personal injury action or other civil matter;

PERSONAL POWERS BEING SOUGHT

The Petitioner is requesting that, as the least restrictive form of intervention necessary to assist the Alleged Incapacitated Person in providing for her personal needs, the proposed Guardian be given the power to:

(1) determine who shall provide personal care or assistance;

(2) make decisions regarding social environment and other social aspects of her life;

(3) determine whether MOLLY MOTHER should travel;

(4) determine whether she should have a license to drive;

(5) authorize access to or release of confidential records;

(6) apply for government and private benefits;

(7) consent to or refuse generally accepted routine or major medical or dental treatment, consistent with the findings of this Court, the patient's wishes, and the standards set forth in MHL § 81.22(a)(8);

(8) choose her place of abode in accordance with the standards set forth in MHL § 81.22(a)(9), provided that no placement is made in a skilled nursing facility or residential care facility without further order of the Court;

WHY the presence of MOLLY MOTHER, the Alleged Incapacitated Person, at the hearing or trial of the issues here should not be required;

WHY the petitioner should not have such other and further or different relief as may be just and proper.

Sufficient reason appearing therefor,

LET personal service **pursuant** to CPLR §308(1) in accordance with Mental Hygiene Law § 81.07(e)(2)(i) of a copy of this Order to Show Cause and of the papers on which it is granted upon MOLLY MOTHER, the Alleged Incapacitated Person not less than fourteen (14) days prior to the return date of this Order to Show Cause; and it is further

ORDERED, that a copy of this Order To Show Cause and Notice of Proceeding only, be served personally or by regular mail, pursuant to Mental Hygiene Law §81.07(g)(2), upon BOBBY BROTHER; SUSAN SISTER, not less than fourteen (14) days prior to the return date of this Order to Show Cause; and it is further

ORDERED, that a copy of this Order to Show Cause, Petition and supporting papers be served upon _____ of _____ _____, telephone no. _____, who is hereby appointed Court Evaluator to investigate the claims made in the petition and to report to the court pursuant

to §81.09 of the Mental Hygiene Law, within three (3) business days of the date of this Order to Show Cause, pursuant to §81.07 (e)(2)(ii) of the Mental Hygiene Law be deemed good and sufficient service; and it is further

ENTER

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Application of SAM SON, and WENDY WIFE for the Appointment of a Guardian of **MOLLY MOTHER,** an Alleged Incapacitated Person	Index No. _____ VERIFIED PETITION FOR APPOINTMENT OF A GUARDIAN

TO THE SUPREME COURT, COUNTY OF NASSAU:

The Petition of SAM SON, the Person in Need of a Guardian's son (hereinafter sometimes referred to as "SAM"), and WENDY WIFE, his wife (hereinafter sometimes referred to as "WENDY"), respectfully shows:

PERSON IN NEED OF A GUARDIAN

1. MOLLY MOTHER, the Person in Need of a Guardian, was born January 1, 1925, and is now 91 (hereinafter sometimes referred to as "MOLLY").

2. MOLLY is a widow.

3. MOLLY currently resides in her home at 123 Sesame Street.

4. MOLLY is in need of a guardian as provided for in Article 81 of the Mental Hygiene Law because she has functional limitations that make her unable to provide for her needs, and because of this we believe that she is likely to suffer harm.

CIRCUMSTANCES OF THE PERSON IN NEED OF A GUARDIAN

5. MOLLY has lived by herself since her husband passed away. MOLLY has become increasingly incapacitated over the last few years, and has recently shown alarming cognitive deficits. She often gets lost when walking or taking mass transit. She wanders from her home with no

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1050 Franklin Avenue
Garden City, New York 11530
(516) 877-7500

discernable destination. Although SAM offers to take MOLLY wherever she needs to go, she will refuse his offers, and then go out on her own. Most recently, MOLLY was found wondering on Sesame Street, soliciting shop owners for a ride to her hairdresser. The police were called and she was brought to the hospital where they confirmed that she suffers from dementia.

6. Although she can walk and feed herself, she has demonstrated difficulty with bathing herself, and she is somewhat incontinent.

7. MOLLY has failed to pay multiple bills as of late, including her tax bill. There is a serious concern among her family members that this may cause her to lose her home.

8. MOLLY's home is in disarray. There are papers and refuse throughout her entire home, to the point where it is difficult to walk or sit down anywhere. MOLLY is washing clothes in her kitchen sink because her washing machine is not operating properly. The window in her bedroom is rotting and needs repair. MOLLY's front door lock is broken and the door will not shut properly. Her refrigerator does not close correctly causing the potential for food to spoil quickly, presenting a health risk. Although these issues have been brought to her attention on multiple occasions, she refuses to allow anyone to fix them. On one occasion MOLLY attempted to change a lightbulb by standing on a table. While doing so, she fell off of the table, dislocating her shoulder.

9. Perhaps what is most alarming is MOLLY's judgment. MOLLY believes that she does not have any physical or cognitive deficits, or at least that she can compensate for all of them. She believes that she can live completely independently, without any assistance, and refuses to accept the notion that she would benefit from the assistance of someone being in her home with her, despite her families' pleas for same. She refuses to have her window, door or appliances fixed, and she insists on undertaking even perilous tasks without the assistance of others. Furthermore, MOLLY often specifically refrains from telling SAM about these issues or when she needs any sort of assistance. She will not tell SAM when she falls, or when she needs a ride or needs anything done in her home. MOLLY does not fully understand the consequences of her actions, and this poses a serious risk to her health and wellbeing.

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PROPERTY POWERS BEING SOUGHT

10. The Petitioner is requesting that, as the least restrictive form of intervention necessary to assist MOLLY in providing for her property needs, the proposed Guardian be given the power to:

(1) marshal the income and assets of MOLLY, and establish bank, brokerage and other similar accounts in the name of the Guardian for MOLLY and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of MOLLY, including, but not limited to, government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL § 11-2.2; inventory personal belongings, and store or dispose, as appropriate;

(2) marshal accounts held jointly in the name of MOLLY and others, without the consent of the listed joint tenant(s), provided that the Social Security number of MOLLY has been used to report dividends from the asset to tax authorities;

(3) close or retitle in the Guardian's name, as Guardian, bank time deposits prior to maturity, upon the finding by this Court that, for purposes of § 9-I and § 238 of the Banking Law, the Order Appointing a Guardian shall be deemed a declaration of incompetence and no banking or savings institution shall impose any penalty upon the transaction;

(4) provide for the maintenance and support of MOLLY;

(5) sell MOLLY's residence, at 123 Sesame Street subject to the approval of this Court;

(6) make gifts, subject to prior court approval, except that no prior approval shall be required if gifts to an individual do not exceed $500 in the calendar year and all gifts to all individuals do not exceed the lesser of 5% of all liquid assets in the guardianship account or $10,000;

(7) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

(8) enter into contracts;

(9) create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of MOLLY;

(10) exercise options to purchase securities or other property;

(11) change beneficiaries under insurance and annuity policies and to surrender the policies

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for their cash value;

(12) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with EPTL 2-1.11(c);

(13) authorize access to or release of confidential records;

(14) apply for, obtain and settle claims for government benefits;

(15) arrange and pay for health care services, health care aides and household help;

(16) lease a primary residence for up to 3 years;

(17) defend or maintain civil proceedings on behalf of MOLLY;

(18) retain attorneys, accountants and similar professionals, subject to prior Court approval and with payment subject to the approval of this Court;

(19) sign and file income tax returns and all other tax documents for any and all tax obligations, and appear before federal, state and local taxing authorities on all claims, litigation, settlements and other related matters;

(20) deal with all pension, retirement, incentive, IRA/Keogh/SEP and similar plans, programs and annuities;

(21) borrow funds to avoid forced liquidation of MOLLY's assets;

(22) engage in Medicaid and estate planning, subject to prior court approval of all proposed transfers, pursuant to MHL § 81.21 (b);

(23) take actions required to make MOLLY eligible for Medicaid;

(24) deal with Medicare and Medicaid claims, litigation and settlement;

(25) establish an irrevocable prepaid funeral plan in accordance with Medicaid regulations;

(26) pay reasonable funeral expenses out of any funds remaining in the guardianship account at death, to the extent that a prepaid funeral plan, if any, is insufficient to do so;

(27) pay bills after death if such debts were incurred before death, and if authority to pay such bills would otherwise have existed;

(28) settle and compromise a personal injury action or other civil matter;

PERSONAL POWERS BEING SOUGHT

11. The Petitioner is requesting that, as the least restrictive form of intervention necessary to

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assist MOLLY in providing for her personal needs, the proposed Guardian be given the power to:

(1) determine who shall provide personal care or assistance;

(2) make decisions regarding social environment and other social aspects of her life;

(3) determine whether MOLLY should travel;

(4) determine whether she should have a license to drive;

(5) authorize access to or release of confidential records;

(6) apply for government and private benefits;

(7) consent to or refuse generally accepted routine or major medical or dental treatment, consistent with the findings of this Court, the patient's wishes, and the standards set forth in MHL § 81.22(a)(8);

(8) choose her place of abode in accordance with the standards set forth in MHL § 81.22(a)(9), provided that no placement is made in a skilled nursing facility or residential care facility without further order of the Court;

DURATION OF THE APPOINTMENT

12. Based on the Person in Need of a Guardian's circumstances as described herein, we are requesting that the term of the Guardian be indefinite.

FINANCIAL RESOURCES OF THE PERSON IN NEED OF A GUARDIAN

13. As best can be determined at this time, MOLLYD's monthly income is as follows:

Supplemental Security Income	$	1,000.00
Pension	$	1,800.00
Annuities	$	800.00
Dividends	$	950.00
TOTAL	$	4,550.00

14. MOLLY is the owner of her home at 123 Sesame Street. We lack personal knowledge of MOLLY's other assets.

15. To the best of my knowledge, MOLLY does not have a safe deposit box.

16. To the best of my knowledge, MOLLY has no other financial resources beyond those

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Garden City, New York 11530
(516) 877-7500

listed in this Petition.

INTERESTED PARTIES

17. The names, addresses, telephone numbers and relationships of the Interested Parties, other than the Petitioner, including distributees as that term is defined in the Surrogate's Court Procedure Act § 103(42), are:

NAME	ADDRESS/TELEPHONE	RELATIONSHIP
BOBBY BROTHER		Son
SUSAN SISTER		Daughter

PETITIONER

18. The Petitioners, SAM SON and WENDY WIFE.

PROPOSED GUARDIAN

19. The Petitioners are asking that Co-Guardians be named for Anna as follows:

NAME	ADDRESS/TELEPHONE	RELATIONSHIP
SAM SON & WENDY WIFE		Son and Daughter-in-law

20. The proposed Co-Guardians are suitable to exercise the powers necessary to assist Anna because they have already shown a willingness to do what is necessary to provide for MOLLY's best interests.

21. We have not discussed the proposed Guardianship with MOLLY, as we do not believe she would agree.

AVAILABLE RESOURCES

22. To the best of our knowledge, MOLLY has no trust, no Health Care Proxy, no designated agent to sign a Do Not Resuscitate Order, and no other similar resources that would sufficiently and reliably provide for her needs or shed light on her preferences for a guardian. MOLLY has

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a Will that was executed roughly ten years ago. MOLLY also has a Power of Attorney which grants SAM very limited powers, and which would not be sufficient to remedy the issues detailed in this petition (see Exhibit A).

OTHER INFORMATION

23. We have retained LOUISE LAWYER, Esq. to represent her in this matter. We respectfully request that the Court, in the Order appointing Co-Guardians, fix a fair and reasonable fee for the petitioner's attorney to be paid from the assets of the Person in Need of a Guardian.

25. No previous application has ever been made to this Court or any other Court of competent jurisdiction for the relief sought herein.

RELIEF SOUGHT

WHEREFORE, your Petitioner prays that the Court:

1. Appoint counsel to represent MOLLY MOTHER in this matter, because the she is not known to have counsel;

2. Declare that MOLLY MOTHER is a Person in Need of a Guardian as the term is defined in MHL § 81.02(b);

3. Appoint SAM SON and WENDY WIFE as Co-Guardians of the person and property of MOLLY MOTHER, with the powers requested in this Petition;

4. At the conclusion of the hearing requested in this Petition, approve a list of parties who must be served with notice of all future proceedings in this matter;

6. Grant such other, further or different relief as the Court deems just and proper.

Dated: December _____, 2016

_____

Signature of Petitioner
SAM SON

EMILY F. FRANCHINA, ESQ.
1050 Franklin Avenue
Garden City, New York 11530
(516) 877-7500

Signature of Petitioner
WENDY WIFE

EMILY F. FRANCHINA, ESQ.
1050 Franklin Avenue
Garden City, New York 11530
(516) 877-7500

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NASSAU)

SAM SON, being duly sworn, deposes and states: I am the Petitioner in the within action, I have read the foregoing Petition and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

_____

Signature of Petitioner
SAM SON

Sworn to before me this
_____ day of December, 2016

_____

Notary Public

LOUISE LAWYER
Attorney for Petitioner
1050 Franklin Avenue
Suite 302
Garden City, New York 11530
(516) 877-7500

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NASSAU)

WENDY WIFE, being duly sworn, deposes and states: I am the Petitioner in the within action, I have read the foregoing Petition and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

_____

Signature of Petitioner
WENDY WIFE

Sworn to before me this
_____ day of December, 2016

_____
Notary Public

LOUISE LAWYER
Attorney for Petitioner
1050 Franklin Avenue
Suite 302
Garden City, New York 11530
(516) 877-7500

At an IAS Part 10 of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Supreme Court Building, 100 Supreme Court Drive, Mineola, New York, on the _____ day of _____, 2016.

P R E S E N T :
HON. ZACHARY ZIRCONIA,
Justice of the Supreme Court.

----------X

In the Matter of the Appointment of

SAM SON and
WENDY WIFE,

as Guardian for the Personal Needs and Property Management of

MOLLY MOTHER,

an Incapacitated Person.

----------X

ORDER AND JUDGMENT APPOINTING GUARDIAN

Index No.: 123456789-I-16

The Petition in writing, duly verified the __ day of _____ 2016, by the Petitioners therein named, having been presented to this Court wherein it was alleged that one, MOLLY MOTHER, is incapacitated as defined under Section 81.02 of the Mental Hygiene Law and requires a Guardian pursuant to Article 81 of said law, and the Court, by Order to Show Cause granted on _____ __, 2016, having required notice of the presentation of said Petition to be given to MOLLY MOTHER, the Alleged Incapacitated Person; BOBBY BROTHER; SUSAN SISTER, NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES, and EVIE EVALUATOR., the Court Evaluator appointed herein, and proof of due service upon each of the aforesaid Respondents and the Court appointee(s) having been duly filed,

AND the Court having thereupon considered said Petition then and there presented; and a

hearing having been conducted on _____ __, 2016, and EMILY F. FRANCHINA, ESQ., having appeared for the Petitioner, and ALICE ATTORNEY, ESQ., having appeared for MOLLY MOTHER, and EVIE EVALUATOR., Court Evaluator having appeared, and on reading and filing the report and recommendations of EVIE EVALUATOR., said Court Evaluator appointed herein,

AND upon evidence presented at the aforesaid hearing,

AND it appearing to the satisfaction of this Court, by clear and convincing evidence, that it is necessary to appoint a Guardian for MOLLY MOTHER in that she is not able to provide for her personal needs and property management in that she has difficulties with cognitive functions as the result of a traumatic brain injury, and is incapacitated as defined under Section 81.02(b) of the Mental Hygiene Law, and said Incapacitated Person, MOLLY MOTHER having appeared at the hearing, and upon all the aforementioned papers heretofore filed herein, the evidence adduced, and the decision of this Court rendered on the record on July 15, 2016, and after due deliberation,

NOW, on motion of LOUISE LAWYER, P.C., attorneys for the Petitioner,

it is

ORDERED AND ADJUDGED, that **SAM SON and WENDY WIFE, both residing at 300 Sesame Street, and with telephone number (123) 456-7890**, the son and daughter-in-law of MOLLY MOTHER, be and he hereby is appointed co-Guardians for the Personal Needs and Property Management of MOLLY MOTHER, an Incapacitated Person, **upon filing a bond in the sum of $_____,** with the Clerk of this Court, to be first approved by a Judge of this Court conditioned that they will faithfully discharge the powers granted by this Court, obey all directions in regard to said powers, and make and render a true account of all properties

received by him in the application thereof, and a true report of his acts in the administration of said powers, whenever so required to do so by this Court, and upon his further filing with the Clerk of this Court a Designation, duly executed and acknowledged, naming the Clerk of this Court or her successor in office as a person on whom service of any process may be made in like manner and with like effect as if it were served personally upon SAM SON and WENDY WIFE, the co-Guardians herein, whenever they cannot with due diligence be served; and it is further

ORDERED AND ADJUDGED, that said co-Guardians shall file the aforesaid bond, Designation, the proposed Commission, and all other necessary papers with the Clerk of the Court within THIRTY (30) DAYS of the date hereof; and it is further

ORDERED AND ADJUDGED, that within FIVE (5) DAYS after SAM SON and WENDY WIFE, the co-Guardians, has filed the above bond and Designation, the Clerk of the Court shall issue a Commission stating the title of this proceeding; the name, address, and telephone number of MOLLY MOTHER, the Incapacitated Person; the name, address, and telephone number of the Guardian; the specific powers granted to the co-Guardians; and the date when the appointment of the co-Guardians was ordered by this Court; and it is further

ORDERED AND ADJUDGED, that the duration of the guardianship is indefinite; and it is further

ORDERED AND ADJUDGED, that the co-Guardians for the Personal Needs and Property Management of MOLLY MOTHER shall afford her the greatest amount of independence and self-determination with respect to her needs and property in light of her functional level, understanding, and appreciation of her functional limitations and personal wishes, preferences, and desires with regard to managing the activities of daily living; and it is further

ORDERED AND ADJUDGED, that the co-Guardians for the Personal Needs and Property Management of the Incapacitated Person shall exercise only those powers that they are authorized to exercise by court order, with the utmost care and diligence when acting on behalf of MOLLY MOTHER, and with the utmost degree of trust, loyalty, and fidelity in relation to her; and it is further

ORDERED AND ADJUDGED, that the co-Guardians given authority with respect to property management of the Incapacitated Person shall marshal the assets of MOLLY MOTHER for the purpose of investing such assets as would a prudent person of discretion and intelligence in such matters seeking reasonable income, and to apply so much of the income and principal as is necessary for the comfort, support, maintenance, and well-being of MOLLY MOTHER; said funds to be held in **a New York State** account(s) titled:

SAM SON and WENDY WIFE, as co-Guardians of the Property of MOLLY MOTHER, an Incapacitated Person"; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall ensure that the bank account(s) to be established hereunder shall provide banking statements and cancelled checks in either original or imaged formats. In the event that the co-Guardians establish a brokerage account(s) with the assets of the Incapacitated Person, the co-Guardians shall retain the original statements of such account(s) for the use and review of the Court Examiner assigned herein; and it is further

ORDERED AND ADJUDGED, that SAM SON and WENDY WIFE, as co-Guardians of the property of MOLLY MOTHER, shall have the following powers:

(1) marshal the income and assets of MOLLY MOTHER, and establish bank, brokerage

and other similar accounts in the name of the Guardian for MOLLY MOTHER and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of MOLLY MOTHER, including, but not limited to, government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL § 11-2.2; inventory personal belongings, and store or dispose, as appropriate;

(2) marshal accounts held jointly in the name of MOLLY MOTHER and others, without the consent of the listed joint tenant(s), provided that the Social Security number of MOLLY MOTHER has been used to report dividends from the asset to tax authorities;

(3) close or retitle in the Guardian's name, as Guardian, bank time deposits prior to maturity, upon the finding by this Court that, for purposes of § 9-I and § 238 of the Banking Law, the Order Appointing a Guardian shall be deemed a declaration of incompetence and no banking or savings institution shall impose any penalty upon the transaction;

(4) provide for the maintenance and support of MOLLY MOTHER;

(5) sell MOLLY MOTHER's residence, at 123 Sesame Street subject to the approval of this Court;

(6) make gifts, subject to prior court approval, except that no prior approval shall be required if gifts to an individual do not exceed $500 in the calendar year and all gifts to all individuals do not exceed the lesser of 5% of all liquid assets in the guardianship account or $10,000;

(7) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

(8) enter into contracts;

(9) create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of MOLLY MOTHER;

(10) exercise options to purchase securities or other property;

(11) change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

(12) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with EPTL 2-1.11(c);

(13) authorize access to or release of confidential records;

(14) apply for, obtain and settle claims for government benefits;

(15) arrange and pay for health care services, health care aides and household help;

(16) lease a primary residence for up to 3 years;

(17) defend or maintain civil proceedings on behalf of MOLLY MOTHER;

(18) retain attorneys, accountants and similar professionals, subject to prior Court approval and with payment subject to the approval of this Court;

(19) sign and file income tax returns and all other tax documents for any and all tax obligations, and appear before federal, state and local taxing authorities on all claims, litigation, settlements and other related matters;

(20) deal with all pension, retirement, incentive, IRA/Keogh/SEP and similar plans, programs and annuities;

(21) borrow funds to avoid forced liquidation of MOLLY MOTHER's assets;

(22) engage in Medicaid and estate planning, subject to prior court approval of all proposed transfers, pursuant to MHL § 81.21 (b);

(23) take actions required to make MOLLY MOTHER eligible for Medicaid;

(24) deal with Medicare and Medicaid claims, litigation and settlement;

(25) establish an irrevocable prepaid funeral plan in accordance with Medicaid regulations;

(26) pay reasonable funeral expenses out of any funds remaining in the guardianship account at death, to the extent that a prepaid funeral plan, if any, is insufficient to do so;

(27) pay bills after death if such debts were incurred before death, and if authority to pay such bills would otherwise have existed;

(28) settle and compromise a personal injury action or other civil matter;

(29) establish a luxury account in the maximum amount allowed by the Nassau County Department of Social Services for future funeral expenses with a reputable funeral establishment in the State of New York;

ORDERED AND ADJUDGED, that SAM SON and WENDY WIFE, as co-Guardians of the person of MOLLY MOTHER, shall have the following powers:

(1) determine who shall provide personal care or assistance;

(2) make decisions regarding social environment and other social aspects of her life;

(3) determine whether MOLLY MOTHER should travel;

(4) determine whether she should have a license to drive;

(5) authorize access to or release of confidential records;

(6) apply for government and private benefits;

(7) consent to or refuse generally accepted routine or major medical or dental treatment, consistent with the findings of this Court, the patient's wishes, and the standards set forth in MHL § 81.22(a)(8);

(8) choose her place of abode in accordance with the standards set forth in MHL §81.22(a)(9), provided that any decision with regard to the place of abode shall be made in consultation with MOLLY MOTHER and upon approval of the Court, and further provided that no placement is made in a skilled nursing facility without further Order of this Court;

ORDERED AND ADJUDGED, that all persons are hereby directed to deliver to the co-Guardians for the Property Management of MOLLY MOTHER, upon demand and presentation of a certified copy of the co-Guardians' Commission, all the property and income of MOLLY MOTHER, that may be in their possession or under their control; and it is further

ORDERED AND ADJUDGED, that all persons are hereby directed and commanded to deliver to the control of the co-Guardian for the Personal Needs of MOLLY MOTHER, upon demand and presentation of a certified copy of the co-Guardians' Commission, all personal property of said Incapacitated Person, including but not limited to, Medicare and Social Security cards, insurance cards, all identification cards, and any other similar documents belonging or issued to MOLLY MOTHER ; and it is further

ORDERED AND ADJUDGED, that the co-Guardians may establish a luxury account for the Incapacitated Person in the maximum amount allowed by the Nassau County Department of Social Services; and it is further

ORDERED AND ADJUDGED, that the co-Guardians may pay from the Incapacitated Person's funds the cost of establishing an Irrevocable Funeral Trust with a reputable funeral establishment in the State of New York for the Incapacitated Person's future burial and funeral expenses; and it is further

ORDERED AND ADJUDGED, that if MOLLY MOTHER now has a Last Will and Testament, or later executes one, the co-Guardians shall forthwith file same with the Clerk of the Nassau County Surrogate's Court, and retain the receipt therefor, and shall file a copy of such receipt with the Court Examiner, and upon the death of the Incapacitated Person, the co-Guardians shall forthwith notify the legal representative of her estate and the Court; and it is further

ORDERED AND ADJUDGED, that within TWENTY (20) DAYS of the date of the death of the Incapacitated Person, the co-Guardians shall file with the Court, the Court Examiner, and the (nominated) personal representative of the estate of the Incapacitated Person, a copy of both the Certificate of Death and a Statement of Death as defined in Section 81.44 of the Mental Hygiene Law. In the event that the identity of the personal representative is not known or able to be ascertained, the co-Guardians shall instead serve a Statement of Death upon the Public Administrator of the County of Nassau; and it is further

ORDERED AND ADJUDGED, that within ONE HUNDRED FIFTY (150) DAYS of the death of the Incapacitated Person and in accordance with Section 81.44 of the Mental Hygiene Law, the co-Guardians shall file a final report and account of his actions as such, and he shall seek his discharge based upon same. Such co-Guardians shall cause the Final Report and Account to be settled on notice to all necessary and appropriate parties by certified mail or personal service at least THIRTEEN (13) DAYS prior to the return date or shall seek a Decree discharging him pursuant to Section 81.34 of the Mental Hygiene Law; and it is further

ORDERED AND ADJUDGED, that if the co-Guardians learns of any previously executed appointment, power, delegation, proxy or advance directive made by the Incapacitated Person, he shall forthwith notify the Court of same and seek further direction, but any directions contained any validly executed living will, health care proxy or other advance directive shall

guide and be binding upon said Guardian with respect to exercising personal needs and medical care decisions in accordance with MOLLY MOTHER'S wishes; and it is further

ORDERED AND ADJUDGED, that the co-Guardians are authorized to pay any ordinary bills of MOLLY MOTHER that may have accrued prior to his appointment; however, Court approval shall be obtained for payment of fees to attorneys, accountants, and other non-medical professionals or for the payment of any extraordinary expenses; and it is further

ORDERED AND ADJUDGED, that within NINETY (90) DAYS after being issued his Commission, the co-Guardians shall file an initial report in accordance with the provisions of Section 81.30 of the Mental Hygiene Law, and mail a copy of said report to _____, **with offices at** _____, **and with telephone number** (_____) _____, **the Court Examiner**, who is hereby assigned to review the intial and annual reports to be submitted; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall file during the month of May of each year, in the Office of the Clerk of the County of Nassau, an annual report in accordance with Section 81.31 of the Mental Hygiene Law, and shall mail a copy of said report to the Court Examiner assigned herein, to the Administrator of the facility in which the Incapacitated Person resides, if any, and to MENTAL HYGIENE LEGAL SERVICE. Such report shall also detail any assets discovered by the Guardian, including rights of action or civil judicial proceedings for the benefit of the Incapacitated Person, which were not contained in the Report of Court Evaluator previously submitted to the Court; and it is further

ORDERED AND ADJUDGED, that if the annual report sets forth any reason for a change in the powers authorized by the Court, the co-Guardians shall make application by Order to Show Cause for such relief; and it is further

ORDERED AND ADJUDGED, that in addition to the foregoing reporting requirements, the co-Guardians shall advise the Court Examiner by written communication, regarding any permanent change in abode of the Incapacitated Person and/or any significant changes in the physical or medical condition of the Incapacitated Person, within THIRTY (30) DAYS thereof; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall notify the Court and the Court Examiner of any change in his/her domicile within THIRTY (30) DAYS of the date of such relocation, and shall file a new designation with the Clerk of the Court reflecting such change in abode; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall visit MOLLY MOTHER, the Incapacitated Person, not less than twelve (12) times per year; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall file the notice required under Section 81.20(a)(6)(vi) of the Mental Hygiene Law if the Incapacitated Person is possessed of any real property; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall comply with Article 17 of the Real Property Actions and Proceedings Law for the purpose of selling or purchasing or encumbering any real property in which MOLLY MOTHER has or will have an interest; and it is further

ORDERED AND ADJUDGED, that if the co-Guardians should locate a safe deposit box in the name of MOLLY MOTHER, the co-Guardians shall inventory the safe deposit box in the presence of a bank officer, and report the contents thereof to the Court Examiner in the initial NINETY (90) DAY report to be filed herein. Notwithstanding the foregoing, however, the co-Guardians shall not be authorized to remove the contents thereof without further order of the Court; and it is further

ORDERED AND ADJUDGED, that the co-Guardians shall be required to complete a training program as provided for under Section 81.39 of the Mental Hygiene Law, either in person or by audio or video tape, and shall submit proof of the completion of such program to the Court Examiner in the initial report to be filed herein; and it is further

ORDERED AND ADJUDGED, that compensation of the co-Guardians shall be set in the further orders of the Court from time to time, unless waived; and it is further

ORDERED AND ADJUDGED, based on the Affirmation of services dated _____ and submitted herein, that the co-Guardians shall pay from the funds of the Incapacitated Person the sum of $_____ to LOUISE LAWYER, P.C., as and for a legal fee ($) and

disbursements ($), as attorneys for the Petitioner for any and all services rendered in this proceeding, including the issuance of the Commission to the Guardian; and it is further

ORDERED AND ADJUDGED, based on the Affirmation of services dated _____ and submitted herein that the co-Guardians shall pay from the funds of the Incapacitated Person the sum of $_____ to EVIE EVALUATOR, as and for his fees and disbursements as Court Evaluator; and it is further

ORDERED AND ADJUDGED, based on the Affirmation of services dated _____ and submitted herein that the co-Guardians shall pay from the funds of the Incapacitated Person the sum of $_____ to ALICE ATTORNEY, ESQ., as and for her fees and disbursements as Court Appointed Counsel for MOLLY MOTHER; and it is further

ORDERED AND ADJUDGED, that if the guardianship is to be terminated, the co-Guardians shall apply to the Court for direction regarding a disposition of the property of MOLLY MOTHER then remaining and for any other instructions concerning said termination; and it is further

ORDERED AND ADJUDGED, that notwithstanding Section 81.16(e) of the Mental Hygiene Law, a copy of this Order and Judgment need not be personally served upon, read or explained to the Incapacitated Person; and it is further

ORDERED AND ADJUDGED, that notice of all further proceedings shall be determined in subsequent orders of this Court; and it is further

ORDERED AND ADJUDGED, that the appointee is a family member, and therefore is not subject to the Part 36 Rules regarding compensation; and it is further

ORDERED AND ADJUDGED, that any appointee herein shall comply with Section 35-a of the Judiciary Law and Parts 26 and 36 of the Rules of the Chief Judge of the State of New York, and no fee shall be paid to such appointee until he has filed all necessary OCA forms with the Court; and it is further

ORDERED AND ADJUDGED, that a true copy of this Order and Judgment be served forthwith by the Petitioner's attorneys upon SAM SON and WENDY WIFE, the co-Guardians

appointed herein; EVIE EVALUATOR., the Court Evaluator; and the Court Examiner assigned herein.

THE CO-GUARDIANS SHALL NOT BE PERMITTED TO ACCESS FUNDS WITHOUT THE ISSUANCE BY THE CLERK OF THE COURT OF A COMMISSION PERMITTING THE GUARDIAN TO MARSHAL ASSETS OR INCOME.

ENTER:

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Appointment of **SAM SON and** **WENDY WIFE** as Co-Guardians for the Personal Needs and Property Management of **MOLLY MOTHER,** an Incapacitated Person.	Index No. 123456789/2016 COMMISSION TO CO-GUARDIANS

THE PEOPLE OF THE STATE OF NEW YORK, TO ALL TO WHOM THESE PRESENTS SHALL COME GREETING:

WHEREAS, by a certain Order of this Court made on the __ day of _____, 2016 and issued to inquire whether or not a Guardian for the personal and property needs should be appointed for MOLLY MOTHER, an Alleged Incapacitated Person, who resides at 123 Sesame Street; and

WHEREAS, a judgment in this proceeding was duly made on the __ day of _____, 2016 entered in the office of the Nassau County Clerk the – day of _____, 2016 appointing SAM SON and WENDY WIFE, as Co-Guardians for the Personal Needs and Property Management of MOLLY MOTHER for an indefinite term; and

WHEREAS, said Co-Guardians will in all things faithfully discharge the duties and obey all lawful directions of any Court of competent jurisdiction pertaining to said trust, and render a just and true account of their actions of all monies received and disbursed whenever required to do so by a Court of competent jurisdiction; and

WHEREAS, the appointment was conditioned upon the filing in the office of the Clerk of Nassau County a bond for the security required by law in the sum of $_____, to be approved by a Justice of this Court, and conditioned upon the requirement that said Co-Guardians will in all things faithfully discharge the duties and obey all lawful directions of any Court of competent jurisdiction pertaining to said trust, and make a just and true account of their actions and of all monies received and disbursed whenever required to do so by a Court of competent jurisdiction; and

WHEREAS the said Co-Guardians have duly given and filed in said Clerk's office their consents duly executed and acknowledged by them, by which they accept said appointment; and

WHEREAS the said Co-Guardians have duly given and filed in the office of the Clerk of the County of Nassau, the designations duly executed and acknowledged, in and by which said Co-Guardians designate the Clerk of this Court, or her successor in office, as a person on whom service of any process may be made in like manner and with like effect as if it were served personally upon them as Co-Guardians of the Incapacitated Person, whenever said Co-Guardians cannot with due diligence be served.

NOW THEREFORE, KNOW that we have granted, given and committed and by these presents do give, grant and commit unto the said SAM SON, and WENDY WIFE, the care, custody and management of the estate, real as well as personal, of MOLLY MOTHER during our pleasure to be signified in our Supreme Court, the following powers:

PERSONAL NEEDS

(1) determine who shall provide personal care or assistance;

(2) make decisions regarding social environment and other social aspects of her life;

(3) determine whether MOLLY MOTHER should travel;

(4) determine whether she should have a license to drive;

(5) authorize access to or release of confidential records;

(6) apply for government and private benefits;

(7) consent to or refuse generally accepted routine or major medical or dental treatment, consistent with the findings of this Court, the patient's wishes, and the standards set forth in MHL § 81.22(a)(8);

(8) choose her place of abode in accordance with the standards set forth in MHL §81.22(a)(9), provided that any decision with regard to the place of abode shall be made in consultation with MOLLY MOTHER and upon approval of the Court, and further provided that no placement is made in a skilled nursing facility without further Order of this Court;

That all persons are hereby directed to deliver to the Co-Guardians of the property of MOLLY MOTHER, upon demand and presentation of a certified copy of the Co-Guardian's Commission, all the property and income of MOLLY MOTHER that may be in their possession or under their control;

That SAM SON and WENDY WIFE, as Co-Guardians for the Personal Needs and Property Management of MOLLY MOTHER, shall have the following powers:

PROPERTY MANAGEMENT

(1) marshal the income and assets of MOLLY MOTHER, and establish bank, brokerage and other similar accounts in the name of the Guardian for MOLLY MOTHER and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of MOLLY MOTHER, including, but not limited to, government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL § 11-2.2; inventory personal belongings, and store or dispose, as appropriate;

(2) marshal accounts held jointly in the name of MOLLY MOTHER and others, without the consent of the listed joint tenant(s), provided that the Social Security number of MOLLY MOTHER has been used to report dividends from the asset to tax authorities;

(3) close or retitle in the Co-Guardians' name, as Co-Guardian, bank time deposits prior to maturity, upon the finding by this Court that, for purposes of § 9-I and § 238 of the Banking Law, the Order Appointing a Guardian shall be deemed a declaration of incompetence and no banking or savings institution shall impose any penalty upon the transaction;

(4) provide for the maintenance and support of MOLLY MOTHER;

(5) sell MOLLY MOTHER's residence, at 123 Sesame Street subject to the approval of this Court;

(6) make gifts, subject to prior court approval, except that no prior approval shall be required if gifts to an individual do not exceed $500 in the calendar year and all gifts to all individuals do not exceed the lesser of 5% of all liquid assets in the guardianship account or $10,000;

(7) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;

(8) enter into contracts;

(9) create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of MOLLY MOTHER;

(10) exercise options to purchase securities or other property;

(11) change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

(12) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with EPTL 2-1.11(c);

(13) authorize access to or release of confidential records;

(14) apply for, obtain and settle claims for government benefits;

(15) arrange and pay for health care services, health care aides and household help;

(16) lease a primary residence for up to 3 years;

(17) defend or maintain civil proceedings on behalf of MOLLY MOTHER;

(18) retain attorneys, accountants and similar professionals, subject to prior Court approval and with payment subject to the approval of this Court;

(19) sign and file income tax returns and all other tax documents for any and all tax obligations, and appear before federal, state and local taxing authorities on all claims, litigation, settlements and other related matters;

(20) deal with all pension, retirement, incentive, IRA/Keogh/SEP and similar plans, programs and annuities;

(21) borrow funds to avoid forced liquidation of MOLLY MOTHER's assets;

(22) engage in Medicaid and estate planning, subject to prior court approval of all proposed transfers, pursuant to MHL § 81.21 (b);

(23) take actions required to make MOLLY MOTHER eligible for Medicaid;

(24) deal with Medicare and Medicaid claims, litigation and settlement;

(25) establish an irrevocable prepaid funeral plan in accordance with Medicaid regulations;

(26) pay reasonable funeral expenses out of any funds remaining in the guardianship account at death, to the extent that a prepaid funeral plan, if any, is insufficient to do so;

(27) pay bills after death if such debts were incurred before death, and if authority to pay such bills would otherwise have existed;

(28) settle and compromise a personal injury action or other civil matter;

(29) establish a luxury account in the maximum amount allowed by the Nassau County Department of Social Services for future funeral expenses with a reputable funeral establishment in the State of New York;

AND that the Co-Guardians shall file during the month of May of each year, in the Office of the Clerk of the County of Nassau, an annual report in accordance with Section 81.31 of the Mental Hygiene Law, and shall mail a copy of said report to the Court Examiner assigned herein, to the Administrator of the facility in which the Incapacitated Person resides, if any, and to MENTAL HYGIENE LEGAL SERVICE. Such report shall also detail any assets discovered by the Co-Guardians, including rights of action or civil judicial proceedings for the benefit of the Incapacitated Person, which were not contained in the Report of Court Evaluator previously submitted to the Court;

AND, that if the annual report sets forth any reason for a change in the powers authorized by the Court, the Co-Guardians shall make application by Order to Show Cause for such relief;

AND, that the Co-Guardians shall notify the Court and the Court Examiner of any change in their domiciles within THIRTY (30) DAYS of the date of such relocation, and shall file new designations with the Clerk of the Court reflecting such change in abode;

AND, the Co-Guardians of the property of MOLLY MOTHER shall file the notice required under MHL §81.20(a)(6)(vi) if MOLLY MOTHER is possessed of any real property;

AND, that the Co-Guardians shall comply with Article 17 of the Real Property Actions and Proceedings Law for the purpose of selling or purchasing any real property in which MOLLY MOTHER has or will have an interest;

AND, that the said Co-Guardians are hereby further required to obey and abide by all orders relating to the Guardianship and to render a full and just account of the execution of their actions and of the estate, property and effects which shall come into the hands of the said Co-Guardians when and as often as said Co-Guardians shall be required to do so by any Court of competent jurisdiction;

WITNESS, MAUREEN O'CONNELL, Clerk of the County of Nassau, 240 Old

Country Road, Mineola, New York, this day of , 2016.

BY THE COURT,

_____

CLERK OF THE COUNTY OF NASSAU

207 A.D.2d 133, 621 N.Y.S.2d 617

In the Matter of Francis E. Maher, Also Known as Frank E. Maher, Respondent. Francis E. Maher, Jr., Also Known as Frank E. Maher, Jr., Appellant.

Supreme Court, Appellate Division, Second Department, New York
93-08446
December 27, 1994

CITE TITLE AS: Matter of Maher

SUMMARY

Appeal from so much of a judgment of the Supreme Court (Sebastian Leone, J.), entered September 29, 1993 in Kings County, as dismissed the petition in a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for property management.

HEADNOTES

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or Property Management
Determination of Incapacity Based on Clear and Convincing Evidence

([1]) In a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for property management for respondent, an attorney who suffered a stroke, Supreme Court properly determined that appellant, respondent's son, failed to establish by the requisite clear and convincing evidence respondent's need for a guardian of his property (Mental Hygiene Law § 81.02 [b]). The clear and convincing evidence in the hearing record establishes only that respondent suffers from certain functional limitations in speaking and writing, but not that he is likely to suffer harm because he is unable to provide for the management of his property, or that he is incapable of adequately understanding and appreciating the nature and consequences of his disabilities. There has been no showing that respondent has lost the ability to appreciate his financial circumstances, or that others have taken control of his affairs without his comprehension or rational supervision. Rather, by executing a new power of attorney in favor of an attorney who had done per diem work for his law firm and by adding his new wife, who is also an attorney, as a signatory on certain of his bank accounts, respondent evidenced that he appreciated his own handicaps to the extent that he effectuated a plan for assistance in managing his financial affairs without the need for a guardian. There has further been no demonstration of any waste, real or imminent, of respondent's substantial assets or any proof of fraud, duress or undue influence on respondent in order to bring about either his marriage or his execution of a second power of attorney. There is an absence of proof that respondent's chosen attorney and his wife are incapable of managing the property at issue in accordance with respondent's wishes.

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or Property Management
Exclusion of "Tests" of Respondent's Difficulties in Speaking and Writing

([2]) In a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for property management for respondent, an attorney who suffered a stroke, Supreme Court properly determined that ***134** appellant, respondent's son, failed to establish by the requisite clear and convincing evidence respondent's need for a guardian of his property (Mental Hygiene Law § 81.02 [b]). The court did not err in excluding from evidence certain "tests" or "demonstrations" of respondent's inability to expatiate on the meaning of a complicated legal text, to write checks in differing amounts to different payees, to separate and count diverse amounts of currency, and to explain his execution of two successive powers of attorney. Since the court was already well aware of respondent's difficulty in communicating his understanding of the questions posed to him, and in writing or counting numbers clearly, such "tests" would not have served to inform the court about the material issue before it of whether respondent appreciated the nature and consequences of his alleged inability to personally manage his property, and that he could suffer harm as a result. As the evidence sought to be

elicited would merely have distracted the court from the main point at issue, the court properly exercised its discretion in denying the admission of that evidence.

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or Property Management
Exclusion of Expert Testimony--Waiver of Physician-Patient Privilege

([3]) In a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for property management for respondent, an attorney who suffered a stroke, Supreme Court properly determined that appellant, respondent's son, failed to establish by the requisite clear and convincing evidence respondent's need for a guardian of his property (Mental Hygiene Law § 81.02 [b]). The court did not err in refusing to allow appellant's expert, who had never examined respondent, to testify about respondent's alleged incapacitation based upon respondent's appearance in the courtroom. Appellant could not compensate for his failure to request a timely psychiatric examination of respondent by permitting his expert to draw professional conclusions about respondent in such an improper setting and under such stressful conditions. Appellant's expert was also correctly precluded from testifying to respondent's competence based upon his review of respondent's hospital records, which appellant's counsel had improperly subpoenaed to his office pursuant to appellant's power of attorney, five days after respondent had revoked that power of attorney. Furthermore, respondent did not waive his physician-patient privilege by permitting the physician in charge of his rehabilitation to testify "fully" to her assessment of his in-patient condition, since the record reveals that this witness relied only upon her own notes during the hearing and at no point consulted respondent's hospital charts.

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or Property Management
Admission of Report of Court Evaluator--Harmless and Prejudicial Error

([4]) In a proceeding pursuant to Mental Hygiene Law article 81 for the appointment of a guardian for property management for a stroke victim, although the hearing court erred in admitting into evidence the report of the court evaluator, urging dismissal of the petition, because the evaluator did not take the stand and submit to cross-examination *(see,* Mental Hygiene Law § 81.12 [b]), the error was harmless in view of the fact that the court expressly based its decision upon its own observations of respondent during the proceedings, and upon the testimony of the various witnesses.***135**

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Incompetent Persons, §§ 4, 15, 62.

Carmody-Wait 2d, Committees for Incompetents or Mental Patients and Conservators for the Impaired §§ 109:182-109:185, 109:196.

Mental Hygiene Law § 81.02 (b); § 81.12 (b).

NY Jur 2d, Infants and Other Persons Under Legal Disability, §§343-345, 353.

ANNOTATION REFERENCES

Mental condition which will justify the appointment of guardian, committee, or conservator of the estate for an incompetent or spendthrift. 9 ALR3d 774.

APPEARANCES OF COUNSEL

Snitow & Pauley, New York City *(William H. Pauley, III,* and *Lyle D. Brooks* of counsel), for appellant.
Irwin F. Simon, New York City, for respondent.

OPINION OF THE COURT

Friedmann, J.

On this appeal--which appears to represent a case of first impression at the appellate level--we are asked to consider the propriety of a determination by the Supreme Court, Kings County (Leone, J.), embodied in a judgment entered October 8, 1993, that the respondent, Francis E. Maher, was not incapacitated as that term is defined in the recently enacted Mental Hygiene Law article 81. Based upon this determination, the court dismissed, with prejudice, the petition for a guardian for the respondent's

property which had been brought by Francis E. Maher, Jr., the respondent's son. Since the court properly applied the standards and carried out the legislative intent of Mental Hygiene Law article 81, we now affirm.

THE FACTS OF THIS CASE

On December 11, 1992, the respondent, attorney Francis E. Maher, suffered a stroke which left him with right-sided hemiplegia and aphasia. He was admitted to St. Luke's-Roosevelt Hospital where, on December 12, he underwent surgery, ***136** *inter alia,* to evacuate a hematoma from the frontal portion of his brain. For some time after the operation, the respondent remained partially paralyzed and aphasic, although occasionally he was able to speak a few words and to move a bit on his right side.

By order to show cause dated December 17, 1992, the appellant commenced a proceeding pursuant to Mental Hygiene Law article 77 for the appointment of a conservator. On December 17, 1992, the Honorable Sebastian Leone, Justice of the Supreme Court, appointed Ronald M. LaRocca, Esq., as temporary receiver, and Margaret M. Bomba, Esq., as the guardian ad litem, for the respondent. The guardian ad litem filed a report dated January 4, 1993, wherein she stated that due to the respondent's physical condition "he is presently incapable of managing his own business and financial affairs", and she recommended the appointment of a conservator of his property. The guardian ad litem objected to the appointment of Ronald M. LaRocca as conservator because of a "perceived conflict of interest"--due to the fact that LaRocca also represented a hospital that owed the respondent considerable sums in attorneys' fees for services rendered in past litigation. By order dated January 20, 1993, the Supreme Court permitted LaRocca to withdraw as temporary receiver and appointed the appellant and Elizabeth Maher, the respondent's sister and for many years his office manager, as temporary receivers pending the conservatorship hearing, upon the posting of an undertaking in the sum of $1,000,000 with an authorized surety company. LaRocca subsequently became the attorney for the appellant in the instant proceeding.

On March 31, 1993--the day on which the respondent executed a power of attorney naming the appellant as his "attorney-in- fact"--the temporary receivers advised the court that the respondent's condition had "improved dramatically" and that the appellant wished to discontinue the proceeding. The guardian ad litem joined in the application, and the court granted the request orally, directing the parties to settle an order withdrawing the petition.

However, according to the appellant, on the very night of the withdrawal petition, namely March 31, 1993, the respondent's condition abruptly deteriorated, and he began to behave in an irrational and abusive manner. At about this same time, the respondent also declared his intention to marry Ms. Helen Kelly, an attorney formerly associated with his law firm, whom he had been seeing since shortly after the death of his ***137** first wife in March of 1992. It was the guardian ad litem's considered opinion that the respondent's agitation was provoked by his sons' attempts to isolate him from Ms. Kelly and other friends, as well as by their refusal to permit him access to funds of any kind.

On May 7, 1993, the appellant announced his intention to go forward with the conservatorship proceeding, based on his allegation that the respondent had become "confused and irrational". On May 19, 1993, the respondent revoked the previously issued power of attorney in favor of the appellant, and executed a new power of attorney in favor of Irwin F. Simon, an attorney who had done per diem work for the respondent's law firm for many years. The guardian ad litem submitted her interim report dated May 20, 1993, along with a proposed order to withdraw the petition. The appellant promptly opposed the guardian ad litem's motion to dismiss, and requested a hearing to explore the need for the appointment of a conservator. The guardian ad litem submitted a "Supplemental Report" on June 1, 1993, defending herself against the appellant's charges of bias, and again urging the dismissal of the petition.

On June 1, 1993, the respondent disappeared from the home that he had shared with the appellant and another of his sons. On June 17, 1993, the respondent married Ms. Kelly.

At the outset of the hearing, which was held on June 21, 1993 and July 16, 1993, the proceeding was converted, with the consent of all parties, to one for the appointment of a guardian for property management under Mental Hygiene Law article 81. At the hearing, testimony was taken from the respondent's sister, Betty Maher, two of his sons, George and the appellant, his speech pathologist, Susan Sachs, and Dr. Valerie Lanyi, a rehabilitation specialist who had treated the respondent at the Rusk Institute, and who had seen him in consultation as recently as June 10, 1993. Testifying for the respondent were the respondent himself, and his wife, Mrs. Helen Kelly Maher. At the conclusion of the hearing, the court found that the appellant had not carried his burden of proving by the requisite clear and convincing evidence that (1) the respondent was incapacitated, and (2) a

guardian was necessary to manage his property and financial affairs.

THE ENACTMENT OF MENTAL HYGIENE LAW ARTICLE 81

The Legislature enacted Mental Hygiene Law article 81 (L 1992, ch 698), effective April 1, 1993, to remedy the perceived ***138** deficiencies in Mental Hygiene Law former articles 77 and 78, which had authorized the appointment of a conservator for the property or a committee for the person, respectively, of individuals whose ability to care for their property was substantially impaired or who were adjudged to be incompetent.

Mental Hygiene Law former article 78, the committee statute, required a finding of complete incompetence. That statute provided no guidance regarding what constituted incompetence, no standard governing the type of proof required to establish incompetence, and no specification respecting the range of powers assumed by a "committee of the person". However, a finding of incompetence resulted in a complete loss of civil rights and the accompanying stigma of total incapacity. Because of this stigma and loss of civil rights, the judiciary became increasingly reluctant to invoke article 78. This reluctance, together with the statutory preference for a conservator which appeared in both Mental Hygiene Law former articles 77 and 78, resulted in the virtual abandonment of the committee procedure (Koppell and Munnelly, *The New Guardian Statute: Article 81 of the Mental Hygiene Law,* 65 NY St BJ [No. 2] 16 [Feb. 1993] [hereinafter Koppell and Munnelly]).

Mental Hygiene Law article 77, the conservatorship statute, enacted in 1972, allowed for the appointment of a conservator for property only. While certain language in article 77 regarding the "personal well-being" of the conservatee suggested the possibility of using conservators of the property to exercise authority over the person of the individual, the needs of the population to be served by guardianship statutes proved so varied that the relief ostensibly offered by article 77 simply did not in fact afford either the authority or the flexibility necessary to address them all (Koppell and Munnelly, *op. cit.).*

On April 30, 1991, the Court of Appeals decided *Matter of Grinker (Rose)* (77 NY2d 703), holding, *inter alia,* that Mental Hygiene Law article 77 did not authorize a court to grant to a conservator the power to commit the conservatee to a nursing home. Such power to so significantly displace personal liberty, the Court explained, can be granted only pursuant to Mental Hygiene Law article 78, the committee statute, "with its full panoply of procedural due process safeguards" *(Matter of Grinker [Rose], supra,* at 710). That decision, although it clarified the respective reaches of articles 77 and 78, reinstated the courts' earlier dilemma. It further left without ***139** recourse the majority of incapacitated individuals who, although somewhat handicapped, were not hopelessly incompetent, and who, notwithstanding their need for varying degrees of assistance with their personal affairs as well as with property management, were not prepared utterly to relinquish in exchange therefor a lifetime's investment in integrity, autonomy, and dignity *(see,* Mental Hygiene Law § 81.01).

THE NEW FRAMEWORK ESTABLISHED BY MENTAL HYGIENE LAW ARTICLE 81

In response to this predicament, in 1992 the New York State Law Revision Commission proposed the creation of a single statute to replace Mental Hygiene Law articles 77 and 78. The projected legislation envisioned "a new type of guardianship proceeding based on the concept of the least restrictive alternative--one that authorizes the appointment of a guardian whose authority is appropriate to satisfy the needs of an incapacitated person, either personal or financial, while at the same time tailored and limited to only those activities for which a person needs assistance. The standard for appointment under this new procedure focuses on the decisional capacity and functional limitations of the person for whom the appointment is sought, rather than on some underlying mental or physical condition of the person. The proposal encouraged the participation of the allegedly incapacitated person in the proceeding to the greatest extent possible" (Koppell and Munnelly, *op. cit.,* at 17).

As a threshold matter, the new legislation emphasizes that "it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs", while at the same time permitting them "to exercise the independence and self- determination of which they are capable". Such intervention was therefore to be "tailored to the individual needs of that person", taking into account "the personal wishes, preferences and desires of the person", and affording the person "the greatest amount of independence and self-determination and participation in all the decisions affecting [his] life" (Mental Hygiene Law § 81.01).

In exercising its discretion to appoint a guardian for an individual's property (the focus of the instant proceeding), a court must make a two-pronged determination: first, that the appointment is necessary to manage the property or financial ***140** affairs of that person, and, second, that the

individual either agrees to the appointment or that the individual is "incapacitated" as defined in Mental Hygiene Law § 81.02 (b) (Mental Hygiene Law § 81.02 [a]).

As to the first prong, "the court shall consider the report of the court evaluator [heretofore the guardian ad litem, although with certain significant differences, as laid out in Mental Hygiene Law § 81.09] ... and the sufficiency and reliability of available resources [e.g., powers of attorney, trusts, representatives and protective payees] ... to provide for personal needs or property management without the appointment of a guardian" (Mental Hygiene Law § 81.02 [a] [2]; § 81.03 [e]).

As to the second prong, a determination of incapacity must be based upon clear and convincing evidence that the person is likely to suffer harm because he is unable to provide for property management and cannot adequately understand and appreciate the nature and consequences of such inability. The burden of proof is on the petitioner *(see,* Mental Hygiene Law § 81.02 [b]; § 81.12 [a]). In reaching its determination, the court must give primary consideration to the functional level and functional limitations of the person, including an assessment of the person's ability to manage the activities of daily living related to property management (e.g., mobility, money management, and banking), his understanding and appreciation of the nature and consequences of any inability to manage these activities, his preferences, wishes, and values regarding management of these affairs, and the nature and extent of the person's property and finances, in the context of his ability to manage them (Mental Hygiene Law § 81.02 [c]; § 81.03 [h]).

Even if all of the elements of incapacity are present, a guardian should be appointed only as a last resort, and should not be imposed if available resources or other alternatives will adequately protect the person *(see,* Law Rev Commn Comments, reprinted in McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.02, 1994 Pocket Part, at 241-242).

ISSUES RAISED ON THIS APPEAL

([1]) Upon our review of the record before us, we are satisfied that the Supreme Court properly assessed the evidence in accordance with both the letter and the spirit of the new Mental Hygiene Law article 81.

Contrary to the appellant's contention, the clear and convincingevidence***141** in the hearing record establishes only that the respondent suffers from certain functional limitations in speaking and writing, but not that he is likely to suffer harm because he is unable to provide for the management of his property, or that he is incapable of adequately understanding and appreciating the nature and consequences of his disabilities. Indeed, by granting a power of attorney to Irwin Simon, and by adding his wife as a signatory on certain of his bank accounts, the respondent evidenced that he appreciated his own handicaps to the extent that he effectuated a plan for assistance in managing his financial affairs without the need for a guardian.

Several witnesses testified to the respondent's ability to understand what he was told and to make his wishes known demonstratively. For example, the respondent's sister testified that she believed that her brother understood her when she provided him with information about the office. The appellant himself conceded that he routinely discussed collection and related business matters with the respondent, and that the respondent had regularly indicated his satisfaction with the appellant's management of his law firm's affairs. Dr. Lanyi, the physician in charge of the respondent's rehabilitation, expressed her doubt that at the time of his discharge from the Rusk Institute in mid-March 1993, the respondent could have managed his checkbook as he had formerly done, but opined that he was nonetheless, even at that time, aware of the magnitude of the sums he was spending. Moreover, according to Dr. Lanyi, when she last saw the respondent on June 10, 1993, her patient appeared to understand everything she said to him or asked of him, noting that on that occasion he had consistently responded to her remarks and inquiries in a prompt, calm manner, with appropriate words or gestures. The respondent's speech therapist, too, documented a steady improvement in her patient's ability to comprehend and respond to the tests she administered. Generally, the consensus among all witnesses was that the respondent had made, and was continuing to make, dramatic progress in his ability to comprehend information and to express himself--as well as in his mobility, which seemed essentially restored to normal--since the initial cerebrovascular episode.

Moreover, the court, which was in the best position to observe the respondent throughout the hearing, remarked that he reacted fittingly to the proceedings-- even to the point of making it clear to his attorney and the court when he felt ***142** that certain questions or answers were objectionable. The court was further persuaded that the respondent knew the correct responses to the questions put to him on the stand, although he was not able verbally to express them.

This case is therefore distinguishable from those relied upon by the appellant, where the respondent had

demonstrably ceased to comprehend his practical affairs, as evidenced, *inter alia,* by a documented dissipation or impending loss of substantial assets *(see, e.g., Matter of Ginsberg [Ginsberg],* NYLJ, Jan. 3, 1992, at 27, col 6; *Matter of Flowers [Dove],* 197 AD2d 515; *Matter of Rochester Gen. Hosp. [Levin],* 158 Misc 2d 522). No such loss or imminent threat of loss has been even alleged, let alone proven, in the case at bar. It is further worthy of note that two of these cases, *Ginsberg* and *Flowers,* were decided under now- repealed Mental Hygiene Law article 77, where the legal standard for a determination of incapacity--whether the respondent suffered from a substantial impairment of his ability to care for his property and manage his finances--was expressly found wanting by the Legislature in fashioning Mental Hygiene Law article 81 *(see,* Law Rev Commn Comments, reprinted at McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law art 81, 1994 Pocket Part, at 242-243).

The instant case more closely resembles those where the allegedly incapacitated person has effectuated a plan for the management of his affairs which obviated the need for a guardian *(see, e.g., Matter of Tait,* NYLJ, May 31, 1994, at 28, col 1; *Matter of Lambrigger,* NYLJ, May 31, 1994, at 37, col 1; *Matter of Gelezewski,* NYLJ, Nov. 17, 1993, at 30, col 2; *Matter of Anonymous, R.A.,* NYLJ, Sept. 28, 1993, at 27, col 2; *Matter of Presbyterian Hosp. [Early],* NYLJ, July 2, 1993, at 22, col 2 [Sup Ct, NY County]).

Although the appellant tries to distinguish the foregoing cases on the ground that the assets at issue were far more modest than the very substantial estate involved here, we do not find the size of the property involved, standing alone, to be dispositive. Rather, in the matter before us, there has been no showing that the respondent has lost the ability to appreciate his financial circumstances, or that others have taken control of his affairs without his comprehension or rational supervision. There has further been no demonstration of any waste, real or imminent, of the respondent's assets. There is an absence of proof that the respondent's chosen attorney and his wife (who is also an attorney) are incapable of managing the ***143** property at issue in accordance with the respondent's wishes. Under such circumstances, the appellant has failed to demonstrate the need for a guardian under the standards enunciated in Mental Hygiene Law article 81.

([2]) The court did not err in excluding from evidence certain "tests" or "demonstrations" of the respondent's inability to expatiate on the meaning of a complicated legal text, to write checks in differing amounts to different payees, to separate and count diverse kinds of currency, and to explain his execution of two successive powers of attorney. The court was already well aware of the respondent's difficulty--due to his expressive aphasia and apraxia--in verbally communicating his understanding of the questions posed to him, and in writing or counting numbers clearly--although he could make himself understood to those to whom he could demonstrate nonverbally. Therefore, such "tests" would not have served to inform the court about the material issue before it--namely, whether the respondent appreciated the nature and consequences of his alleged inability personally to manage his property, and that he could suffer harm as a result *(see,* Mental Hygiene Law § 81.02 [b]). As the evidence sought to be elicited would merely have distracted the court from the main point at issue, the court properly exercised its discretion in denying the admission of that evidence *(see, Harvey v Mazal Am. Partners,* 79 NY2d 218, 223-224; *People v Acevedo,* 40 NY2d 701, 704-705; *Clark v Brooklyn Hgts. R. R. Co.,* 177 NY 359, 361; *Riddle v Memorial Hosp.,* 43 AD2d 750, 751; Richardson, Evidence §§ 134, 136 [Prince 10th ed]).

([3]) The court was similarly justified in refusing to allow the appellant's expert, Dr. Gannon, who had never examined the respondent, to testify to the respondent's alleged incapacitation based upon his appearance in the courtroom. As the court correctly ruled, the appellant could not compensate for his failure to request a timely psychiatric examination of the respondent by permitting Dr. Gannon to draw professional conclusions about the respondent in such an improper setting and under such stressful conditions. Dr. Gannon was also correctly precluded from testifying to the respondent's competence ***144** based upon his review of the respondent's hospital records, which the appellant's counsel had subpoenaed to his office on May 24, 1993, pursuant to his client's power of attorney, some five days after that power of attorney had been revoked. There is further no merit to the appellant's contention that the respondent had waived his physician-patient privilege by permitting the appellant's witness, Dr. Lanyi, to testify "full[y]" to her assessment of his inpatient condition, because the record reveals that Dr. Lanyi relied only upon her own notes during the hearing, and at no point consulted the respondent's charts from St. Luke's-Roosevelt Hospital or the Rusk Institute.

([4]) Finally, the hearing court erred in admitting into evidence the report of the court evaluator because, although present at the hearing, the court evaluator did not take the stand and submit to cross-examination *(see,* Mental Hygiene Law § 81.12 [b]). We conclude that this error was harmless, however, in view of the fact that the court expressly based its decision upon its own observations of the respondent during the proceedings, and upon the testimony of the various witnesses.

Moreover, the record amply supports the Supreme Court's conclusion that the appellant failed to establish by the requisite clear and convincing evidence the respondent's need for a guardian of his property under the standards enunciated in Mental Hygiene Law article 81, independently of the improperly admitted court evaluator's report *(see, e.g., Berger v Estate of Berger,* 203 AD2d 502; *Matter of Wieczorek,* 186 AD2d 204; *Matter of LoGuidice,* 186 AD2d 659, 660; *Turner v Danker,* 30 AD2d 564).

Therefore, the judgment is affirmed insofar as appealed from.

O'Brien, J. P., Joy and Krausman, JJ., concur.

Ordered that the judgment is affirmed insofar as appealed from, with costs.*145

Footnotes

* It is further worthy of note that there has been no serious allegation, let alone demonstration, that either Ms. Kelly or Mr. Simon-- two individuals with whom the respondent had long been acquainted *(cf., Matter of Ginsberg [Ginsberg],* NYLJ, Jan. 3, 1992, at 27, col 6, *supra)*-- used fraud, duress, or undue influence on the respondent in order to bring about either his marriage or his execution of a second power of attorney.

95 N.Y.2d 148, 733 N.E.2d 1093, 711 N.Y.S.2d 824, 2000 N.Y. Slip Op. 05628

In the Matter of Kashmira Shah, Respondent.
Helen Hayes Hospital et al., Appellants.
In the Matter of Bipin Shah, Respondent,
v.
Barbara DeBuono, as Health Commissioner of the State of New York, et al., Appellants.

Court of Appeals of New York
83, 84
Argued May 10, 2000;
Decided June 8, 2000

CITE TITLE AS: Matter of Shah (Helen Hayes Hosp.)

SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 6, 1999, insofar as it affirmed an order and judgment (one paper) of the Supreme Court (Alfred J. Weiner, J.), entered in Rockland County in a proceeding pursuant to Mental Hygiene Law article 81, appointing Kashmira Shah as the guardian of Bipin Shah and directing her to "transfer all the assets of Bipin Shah ... to his wife Kashmira Shah for her support ... and to qualify Bipin Shah for Medical Assistance."

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 6, 1999, which, in a proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in Rockland County), granted the petition to the extent of annulling the determination of the Commissioner of the State Department of Health that denied the application of petitioner for Medicaid benefits on the ground that he is not a New York State resident, and remitted the matter to the Rockland County Department of Social Services to process petitioner's application.

Matter of Shah, 257 AD2d 275, affirmed.

Matter of Shah v DeBuono, 257 AD2d 256, affirmed.

HEADNOTES

Social Services
Medical Assistance

Residency Requirement

([1]) Petitioner, who was living in New Jersey when he was seriously injured at work in New York, and has been comatose and hospitalized in New York ever since, is a resident of New York for purposes of determining his eligibility for Medicaid. The applicable Federal regulations set forth a straightforward definition of residency for Medicaid eligibility purposes, and provide ***149** that for any institutionalized individual who became incapable of indicating intent at or after age 21, "the State of residence is the State in which the individual is physically present," except where another State makes a placement (42 CFR 435.403 [i] [3]). Petitioner is institutionalized, became incapacitated after the age of 21, is physically present in New York, and was not placed there by New Jersey. The letter provided by New Jersey to New York's Department of Health stating that New Jersey was not disputing the petitioner's residency status with regard to his right to apply for New Jersey Medicaid benefits does not constitute an "interstate agreement[ ]" as defined in 42 CFR 435.403 (k), which would render him a New Jersey resident pursuant to the definition of a State resident set forth in 42 CFR 435.403 (d) (2).

Social Services
Transfer of Property to Qualify for Assistance

Transfer to Guardian Spouse of Incapacitated Spouse's Assets

([2]) A guardian spouse is permitted pursuant to Mental Hygiene Law § 81.21 to transfer to herself, for purposes of Medicaid planning, the entire assets of her incapacitated spouse. She may simultaneously refuse, pursuant to the "spousal refusal" rule, to have the transferred assets included in the calculation of income

and resources available to her spouse for Medicaid assistance (42 USC § 1396r-5 [c] [3]; Social Services Law § 366 [3] [a]). Guardians have the power to make gifts, provide support for dependents, and simultaneously apply for government benefits (Mental Hygiene Law § 81.21 [a]). A court may grant an application to approve a specific transfer of assets if it is satisfied by clear and convincing evidence that a competent, reasonable individual in the incapacitated person's position would be likely to make the transfer under the same circumstances, and any person in petitioner spouse's condition would prefer that the costs of his care be paid by the State, as opposed to his family. The State, however, is not deprived of all opportunity to seek recoupment from petitioner, as the exercise of the right of spousal refusal simply requires a reimbursement process to obtain resources from the community spouse after Medicaid benefits are paid, instead of at an initial calculation stage that might limit the amount of Medicaid benefits to be provided.

Appeal
Academic and Moot Questions

([3]) A combined CPLR article 78 proceeding and Mental Hygiene Law article 81 proceeding commenced to determine the eligibility of petitioner's spouse for New York Medicaid benefits, and the ability of petitioner, as guardian, to transfer the spouse's assets to herself for purposes of Medicaid planning, will not be dismissed as moot because of a settlement in the underlying Federal tort action providing for payment of the spouse's hospital expenses. The settlement agreement provides that the amount of payment that will actually be made to the hospital is dependent upon the determination of the Court of Appeals with respect to the residency and guardianship transfer of assets issues.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Appellate Review, § 640; Welfare Laws, §§ 53-55, 72.5.

Carmody-Wait 2d, Appeals in General §§ 70:319, 70:323, 70:324.

McKinney's, Mental Hygiene Law § 81.21; Social Services Law § 366 (3) (a).***150**

42 USCA § 1396r-5 (c) (3).

NY Jur 2d, Appellate Review, § 9; Public Welfare and Old Age Assistance, §§ 146-156.

ANNOTATION REFERENCES

See ALR Index under Appeal and Error; Medicaid.

POINTS OF COUNSEL

Gary C. Samuels, Assistant County Attorney of Rockland County, Pomona (*Ralph A. Cipriani* and *Carol L. Barbash* of counsel), for Noah Weinberg, appellant in the first above-entitled proceeding.
I. The court below erred in failing to apply the principles of *Matter of Gomprecht v Gomprecht* (86 NY2d 47) to the guardianship proceedings under Mental Hygiene Law article 81. (*Matter of Schachner v Perales,* 85 NY2d 316.) II. Reliance by the court below on the decision in *Matter of John XX.* (226 AD2d 79) Medicaid planning is in error. (*Matter of DaRonco,* 167 Misc 2d 140.) III. The lower court erred in appointing a guardian of the property and granting power to transfer assets of the alleged incapacitated person without clear and convincing proof of the financial condition and needs of such person and his dependents, the standards set forth in Mental Hygiene Law § 81.21 and Social Services Law § 366-c and the appropriateness of the proposed "Medicaid plan." (*Matter of Golf v New York State Dept. of Social Servs.,* 91 NY2d 656.)
Fatoullah Associates, New York City (*Ellice Fatoullah* of counsel), for respondent in the first above-entitled proceeding.
I. The lower court correctly allowed the guardian to transfer all of Bipin Shah's assets to his wife, in accordance with article 81 of the Mental Hygiene Law, as well as State and Federal Medicaid laws. (*Matter of Gomprecht v Gomprecht,* 86 NY2d 47; *Matter of Golf v New York State Dept. of Social Servs.,* 91 NY2d 656; *Matter of Septuagenarian v Septuagenarian,* 126 Misc 2d 699; *Matter of Schachner v Perales,* 85 NY2d 316; *Matter of John XX.,* 226 AD2d 79, 89 NY2d 814; *Matter of DaRonco,* 167 Misc 2d 140; *Matter of Daniels,* 162 Misc 2d 840; *Matter of Escher,* 94 Misc 2d 952, 52 NY2d 1006; *Matter of Felix v Herman,* 257 AD2d 900; *Matter of Craig,* 82 NY2d 388.) II. Bipin Shah is a resident of New York State for Medicaid eligibility purposes.
Eliot Spitzer, Attorney General, New York City (*Mark Gimpel,Preeta****151** *D. Bansal, Robert Forte* and *Carol Fisher* of counsel), for Barbara DeBuono, appellant in the

second above-entitled proceeding. I. The State in which an institutionalized, incapacitated person is physically present is his residence for Medicaid purposes only if the State in which the person was living when he became incapacitated cannot be determined and the interested States cannot agree regarding the State of residence. (*Matter of Hull-Hazard, Inc. v Roberts,* 136 AD2d 872; *Matter of John Paterno, Inc. v Curiale,* 88 NY2d 328.) II. The assets of an incapacitated person cannot be insulated from his debtors merely by authorizing their transfer to his spouse. (*Matter of Gomprecht v Gomprecht,* 86 NY2d 47; *Matter of Golf v New York State Dept. of Social Servs.,* 91 NY2d 656; *Matter of John XX.,* 226 AD2d 79; *Commissioner of Dept. of Social Servs. of City of N. Y. v Spellman,* 243 AD2d 45; *State of New York v Coyle,* 171 AD2d 288; *Matter of DaRonco,* 167 Misc 2d 140.)

Gary C. Samuels, Assistant County Attorney of Rockland County, Pomona (*Ralph A. Cipriani* and *Carol L. Barbash* of counsel), for Noah Weinberg, appellant in the second above-entitled proceeding. The decision of the New York State Department of Health was correct in determining petitioner-appellee Bipin Shah to be a New Jersey resident for Medicaid purposes.

Fatoullah Associates, New York City (*Ellice Fatoullah* of counsel), for respondent in the second above-entitled proceeding.

I. Bipin Shah is a resident of New York State for Medicaid eligibility purposes. (*Matter of Lundgren v New York State Dept. of Social Servs.,* 145 AD2d 792; *Matter of McMorris v Glass,* 226 AD2d 978; *Bethesda Lutheran Homes & Servs. v Leean,* 122 F3d 443; *Shapiro v Thompson* 394 US 618; *Attorney Gen. of N. Y. v Soto-Lopez,* 476 US 898.) II. The Rockland County Department of Social Services' denial of Bipin Shah's Medicaid application on the ground that he is not a resident of Rockland County is incorrect as a matter of law.

Woods Oviatt Gilman, L. L. P., Rochester (*René H. Reixach* of counsel), and *Booth Harrington Johns & Toman, L. L. P.,* Greensboro, North Carolina (*A. Frank Johns* of counsel), for National Academy of Elder Law Attorneys and others, *amici curiae* in the two above-entitled proceedings.

I. Federal regulation 42 CFR 435.403 sets forth a bright line rule that controls the determination of residence under the Medicaid ***152** program. (*Matter of Dunbar v Toia,* 45 NY2d 764; *Atkins v Rivera,* 477 US 154; *Batterton v Francis,* 432 US 416; *Chevron U.S.A. v Natural Resources Defense Council,* 467 US 837; *Matter of Lundgren v New York State Dept. of Social Servs.,* 145 AD2d 792; *Bethesda Lutheran Homes & Servs. v Leean,* 122 F3d 443; *Matter of Corr v Westchester County Dept. of Social Servs.,* 33 NY2d 111; *Matter of Gibbs v Berger,* 59 AD2d 282; *Matter of Barton v Lavine,* 38 NY2d 785.) II. The guardianship order appropriately honored Federal law and the substituted judgment rule. (*Matter of Lord,* 227 NY 145; *Matter of Flagler,* 248 NY 415; *Matter of Baird,* 167 Misc 2d 526; *Matter of Street,* 162 Misc 2d 199; *Bacon v Toia,* 648 F2d 801, *affd sub nom. Blum v Bacon,* 457 US 132; *Matter of John XX.,* 226 AD2d 79.)

OPINION OF THE COURT

Bellacosa, J.

([1]) These two appeals bring before this Court novel questions regarding "Medicaid planning" in New York State. We must interpret and resolve intricately intertwined Federal and State laws and regulations as applied in the context of these related proceedings. The lead case, *Matter of (Bipin) Shah,* poses the question whether Mr. Shah is a resident of New York for purposes of determining eligibility to receive New York Medicaid benefits. The Appellate Division meticulously examined and applied the pertinent regulations in concluding that he was a New York resident. We now affirm.

([2]) Given this decision, we also reach the question in the other case, *Matter of (Kashmira) Shah,* whether a spouse, qualified as guardian, is permitted to transfer to herself, for purposes of Medicaid planning, the entire assets of her incapacitated spouse pursuant to Mental Hygiene Law § 81.21. Upon a fastidious analysis, the Appellate Division approved the transfer authorized by Supreme Court. We, too, affirm.

I.

Bipin Shah lived in New Jersey with his wife, Kashmira, and their two children. On August 1, 1996, while at work in Suffolk County, New York, he was severely injured and lapsed into a coma. At first, he was hospitalized in Suffolk County. On September 29, 1996, at his wife's request, he was transferred to Helen Hayes Hospital in Rockland County, just across the border from the family home in New Jersey. His comatose condition is not expected to improve. He is almost 50 years of age.***153**

On January 9, 1997, Helen Hayes Hospital advised Mrs. Shah that private insurance benefits would soon be exhausted and "absent an accepted Medicaid application, Bipin and Kashmira Shah will be personally responsible for payment" of approximately $1,600 per day. Mrs. Shah executed a "Spousal Refusal," a procedural benefit available in New York (but not New Jersey) by which spouses may decline to make their income and resources available for the cost of the other spouse's care, without

jeopardizing the needy spouse's ability to receive Medicaid benefits. Indeed, the device aids and facilitates the entitlement to such medical assistance.

Mrs. Shah next commenced a guardianship proceeding in Rockland County pursuant to Mental Hygiene Law article 81 and filed a Medicaid application for Mr. Shah. The goal of the guardianship proceeding was to effectuate Medicaid planning: to transfer all of Mr. Shah's assets to the guardian spouse so she could use the assets to support herself and their children, and so Mr. Shah could qualify for New York medical assistance benefits. The hospital and Rockland County Department of Social Services (DSS) intervened in the guardianship proceeding and opposed the transfer. Supreme Court, Rockland County, held a hearing regarding this matter on February 5, 1997.

On March 28, 1997, while the guardianship proceeding was pending, the Rockland County DSS denied the Medicaid application on the ground that Mr. Shah was not a resident of Rockland County. It transferred the Medicaid application to Suffolk County, which also denied the application because Mr. Shah was not a resident of New York State. Mrs. Shah requested a fair hearing.

In May 1997, Supreme Court, Rockland County, authorized the appointment of Mrs. Shah as guardian and the transfer to herself of all Mr. Shah's assets. The hospital and Rockland County DSS appealed.

On June 12, 1997, New Jersey provided a letter to New York's Department of Health (DOH) stating that New Jersey was "not disputing Bipin Shah's residency status with regard to his right to apply for New Jersey Medicaid benefits." The State of New York and Rockland County rely on this letter as a "letter agreement," within the ambit and authorization of the Federal regulation's "interstate agreements" (42 CFR 435.403 [k]).

In July 1997, DOH upheld the Rockland and Suffolk County denials of Medicaid assistance on the fair hearing phase. Mrs. ***154** Shah next started a CPLR article 78 proceeding challenging this determination.

On July 6, 1999, the Appellate Division, Second Department, decided the respective matters, *Matter of (Bipin) Shah* (the transferred article 78 proceeding regarding the DOH residency determination) and *Matter of (Kashmira) Shah* (the Rockland County appeal regarding the guardianship transfer). With respect to residency, it analyzed the pertinent Federal and State regulations and stated:

"The [Medicaid rules] ... are unambiguous, and neither this Court nor the respondent agencies have the power to rewrite the rules so as to make them conform with what may well be a more rational approach to the definition of residency. The determination under review must therefore be annulled" (*Matter of [Bipin] Shah,* 257 AD2d 256, 260).

This Court granted DOH and Rockland County DSS leave to appeal from that New York residency ruling in favor of the Shahs.

With respect to the guardianship-transfer of assets phase of the matter, the Appellate Division affirmed Supreme Court, stating:

"it is, or should be, clear that Mr. Shah, who had the unrestricted right to give his assets to his wife, or to his children, or to anyone else for that matter, at all times up to the moment of his terrible injury, did not, on account of that injury, lose that fundamental right merely because he is now incapacitated and financial decisions on his behalf must necessarily be made by a surrogate. The relief granted pursuant to Mental Hygiene Law article 81 is designed to permit an incapacitated person to do, by way of a surrogate, those essential things such a person could do but for his or her incapacity" (*Matter of [Kashmira] Shah,* 257 AD2d 275, 282).

This Court granted the hospital and Rockland County DSS leave to appeal from that ruling which also favored the Shahs.

II.

Just before the joint oral argument of these appeals, counsel for the Shahs formally moved to dismiss the appeals because of ***155** a settlement in the Federal tort action involving the underlying matter. The suit was brought on behalf of Mr. Shah as a result of the accident that caused his incapacitation. The settlement in Federal court provided for payment of the hospital expenses out of the proceeds of the settlement. Thus, Medicaid payment, as such, is no longer an issue.

([3]) However, the settlement agreement provides that the amount of payment that will actually be made to the hospital is dependent upon this Court's determination with respect to the residency and guardianship transfer of assets issues. We are satisfied that the legal issues intertwined in these matters do not render the appeals moot. Therefore, the motion to dismiss the appeals is denied.

III.

In *Matter of (Bipin) Shah,* we examine DOH's administrative determination of "residency" pursuant to the pertinent regulations. DOH and Rockland County DSS argue that the DOH determination of New Jersey residency for Medicaid purposes was correct. DOH focuses on the fact that New Jersey residency was never disputed by New Jersey, as evidenced by the "letter agreement." It asserts further that Federal regulations regarding the definition of residency for eligibility determinations do not apply unless residency is disputed. Furthermore, DOH stresses that Kashmira Shah's "substituted intent" shows that she treats Mr. Shah as a New Jersey resident for all purposes other than Medicaid planning (including for diversity of jurisdiction to support the Federal lawsuit), and that she should not be allowed to "take advantage" of New York's "spousal refusal" provisions in this manner and matter.

Bipin Shah and *amici curiae* argue that, as reflected in the thorough decision at the Appellate Division, the Federal regulations set forth a straightforward definition of residency for Medicaid eligibility purposes and that, pursuant to that definition, Mr. Shah qualifies as a New York resident. We agree with that approach and conclusion.

The core question here is, when faced with a Medicaid application, how should a New York Medicaid agency (here the County Department of Social Services) define residency for purposes of determining Medicaid eligibility? The answer is directly available. New York, like all other States, is guided and governed through the pertinent Federal regulations promulgated by the Health Care Financing Administration. 42 CFR part 435 defines "Eligibility in the States." Subpart A ("General Provisions and Definitions") states:***156**

"[t]his part sets forth, for the 50 States ... The eligibility requirements and procedures that the Medicaid agency *must use in determining* and redetermining *eligibility,* and requirements it may not use" (42 CFR 435.2 [c]) (emphasis added).

Subpart E ("General Eligibility Requirements") contains the guidelines regarding "State residence" (42 CFR 435.403). It specifically defines "*Who is a State resident*" as:

"A resident of a State is any individual who:

"(1) meets the conditions in paragraphs (e) through (i) of this section; or

"(2) Meets the criteria specified in an interstate agreement under paragraph (k) of this section" (42 CFR 435.403 [d] [emphasis added]).

Appellants urge application of prong (2) of this definition to avoid the alternative qualification method referenced through prong (1). However, the proffered New Jersey "letter agreement" is neither an "interstate agreement [ ]," nor an agreement promulgated pursuant to an "interstate agreement[ ]" as defined in 42 CFR 435.403 (k).

The terms of the New Jersey letter simply do not comply with that alternative, exceptional proviso, and that letter cannot trump the application and operation of prong (1). The letter does not purport to set forth "rules and procedures resolving cases of disputed residency," and it does not "contain a procedure for providing Medicaid to individuals pending resolution of the case" (42 CFR 435.403 [k]; *compare, State of Georgia v Stuckey Health Care,* 189 Ga App 126, 375 SE2d 235 [reciprocal interstate agreement in place]). Nor does it constitute an agreement that may be used "other than [in] cases of disputed residency" because it is simply not an "interstate agreement[ ]" as contemplated by the Federal regulation (*see,* 42 CFR 435.403 [k]). It reflects merely a unilateral expression from a New Jersey employee that New Jersey will entertain Mr. Shah's Medicaid application and will not dispute it on the basis of residency.

That letter is a far cry from a bilateral "interstate agreement" and cannot displace a determination of New York residency based on plainly qualifying features found in prong (1) of 42 CFR 435.403 (d). That provision directs agencies to paragraphs (e) through (i) for guidance. The plain category applicable to Mr. Shah's situation is (i), "*Individuals Age 21 and Over*". The pertinent subpart is (3):***157**

"For any institutionalized individual who *became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual is physically present,* except where another State makes a placement" (42 CFR 435.403 [i] [3] [emphasis added]).

([1]) Appellants are not contending that New Jersey made a placement. Thus, Mr. Shah plainly falls under the core aspects of the primary category. He is institutionalized; he became incapacitated after age 21; and he is physically present in New York. The State of New York is his residence, plain and simple, for the operational purposes of 42 CFR 435.403 (i) (3).

Appellants, nevertheless, rely on 42 CFR 435.403 (a), a

"Requirement," and 42 CFR 435.403 (j) (3), a "Specific prohibition," to expel Mr. Shah from his (i) (3) category of New York residency. The "requirement" proviso is that:

"The agency must provide Medicaid to eligible residents of *the State,* including residents who are absent from *the State*" (42 CFR 435.403 [a] [emphasis added]).

The "specific prohibition" feature declares:

"The agency may not deny or terminate a resident's Medicaid eligibility because of that person's temporary absence from *the State* if the person intends to return when the purpose of the absence has been accomplished, unless another State has determined that the person is a resident there for purposes of Medicaid" (42 CFR 435.403 [j] [3] [emphasis added]).

Appellants insist that "the State" here means New Jersey, and Mr. Shah is actually absent from New Jersey, which should, therefore, pay his benefits. True, he is absent from New Jersey, but that is not determinative of the operative question. It is New York that is required to make the Medicaid determination, so New York is "the State" for purposes of construing these regulations. Thus, the "requirement" proviso (a) applies in such a way that New York "must" provide Medicaid to Mr. Shah if he is an eligible "resident," and the "prohibition" proviso (j) (3) does not apply because Mr. Shah is certainly not temporarily absent from New York--he is undeniably institutionalized in a New York hospital.

Instead, specified prohibitions (j) (1) and (j) (2) directly apply to Mr. Shah's situation:***158**

"(1) The agency may not deny Medicaid eligibility because an individual has not resided in the State for a specified period.

"(2) The agency may not deny Medicaid eligibility to an individual in an institution, who satisfies the residency rules set forth in this section, on the grounds that the individual did not establish residence in the State before entering the institution" (42 CFR 435.403 [j] [1], [2]).

Ironically, these very prohibited bases for denials are proposed as appellants' justification for what DOH declared when it rendered its flawed residency determination.

We conclude that the Appellate Division's New York residency ruling is well-founded and correct. The Appellate Division properly annulled the determination which was based on factors beyond the scope of the agency's authority.

IV.

Since we are satisfied that Mr. Shah qualifies as a New York resident for purposes of Medicaid benefits, we turn to the second and related aspect of this couplet of appeals. Guardianship and the transfer of assets between spouses for Medicaid planning purposes, particularly in relation to the New York right of "spousal refusal," are the next set of considerations.

DOH and Rockland County DSS acknowledge that as a result of the Medicare Catastrophic Coverage Act of 1988, a community spouse need not liquidate the entirety of his or her assets in order to allow the institutionalized spouse to qualify for Medicaid benefits. However, their argument includes the balance wheel that the community spouse should be allotted only a "minimum monthly maintenance needs allowance" and a "community spouse resource allowance." They assert that policy and fiscal goals are to prevent hoarding of excess resources from medical care creditors by a community spouse in order to qualify the needy spouse for Medicaid. Appellants assert that the "spousal refusal" safeguard applies to assets that the refusing spouse already possesses but was not meant to allow a community spouse to receive even more assets from her institutionalized spouse in order to shield them, as well.

Kashmira Shah and *amici curiae* argue that the guardianship order and transfer is proper pursuant to the Mental Hygiene Law, State and Federal law, and the doctrine of substituted judgment. Again, we agree with the Appellate Division ruling, which affirmed Supreme Court's approach.***159**

([2]) Since shortly after Mental Hygiene Law article 81 was enacted, various sources of authority have described transfers for Medicaid planning as being within the scope of the article (*see, Matter of John XX.,* 226 AD2d 79, *lv denied* 89 NY2d 814; Bailly, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.21, 2000 Supp Pamph, at 84; *see also,* Russo and Rachlin, New York Elder Law Practice, § 5.42, at 229 [1998 ed]). We now confirm that a guardian spouse is permitted to effectuate this kind of Medicaid planning on behalf of an incapacitated individual pursuant to Mental Hygiene Law article 81.

Section 81.21 provides, in pertinent part, that a court may authorize a guardian:

"to exercise *those powers necessary and sufficient* to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act" (Mental Hygiene Law § 81.21 [a] [emphasis added]).

The potentiality invested in a guardian includes the power to "make gifts" (Mental Hygiene Law § 81.21 [a] [1]), to "provide support for persons dependent upon the incapacitated person" whether or not such support is legally required (Mental Hygiene Law § 81.21 [a] [2]), and to "apply for government ... benefits" (Mental Hygiene Law § 81.21 [a] [12]).

In determining whether to approve a specific application for a transfer of assets, the court shall consider several factors, including: "whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts" (Mental Hygiene Law § 81.21 [d] [4]); and "whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents" (Mental Hygiene Law § 81.21 [d] [5]).

Considering these factors, a court may grant the application if satisfied by clear and convincing evidence that, among other ***160** things, "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances" (Mental Hygiene Law § 81.21 [e] [2]). We agree with the common sense verity uttered by the Appellate Division that the transfer here was properly authorized because "[t]here can be no quarreling with the Supreme Court's determination that any person in Mr. Shah's condition would prefer that the costs of his care be paid by the State, as opposed to his family" (*Matter of [Kashmira] Shah,* 257 AD2d 275, 282, *supra, lv granted* 94 NY2d 755).

Rockland County DSS seizes on the "transfer *a part* of the ... assets" phraseology in an effort to establish that the transfer of the entire assets here was improper because of the Medicaid planning aspect of the transfer (Mental Hygiene Law § 81.21 [a] [emphasis added]; *see also,* Mental Hygiene Law § 81.21 [b]). Appellants would have us essentially say that if Mrs. Shah is going to apply for Mr. Shah's Medicaid benefits, she cannot transfer *all* of his assets to herself, since she is also invoking the right of spousal refusal. Appellants misconstrue the law and conflate the guardianship issue, a matter of court discretion, with strictly guided agency Medicaid eligibility calculations. We are not convinced that when State courts make their article 81 determinations, they are explicitly limited by rubrics that apply in the context of decisions made by State administrative agencies in these circumstances (*compare,* New York's option of "spousal refusal" with New Jersey's lack of same).

The specifically enumerated potential powers of the New York guardian are unlimited and certainly not contingent on the particular purpose for the transfer--the guardian can make gifts, provide support for dependents and, simultaneously, apply for government benefits (*see,* Mental Hygiene Law § 81.21 [a]). The only "limitation" is that of the doctrine of substituted judgment--the guardian's actions must "take[ ] in account the personal wishes, preferences and desires of the [incapacitated] person" (Mental Hygiene Law § 81.01; *see also,* NY Law Rev Commn Comments, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.21, at 376).

Appellants urge that under the Medicaid statutes, resources that exceed the "community spouse resource allowance" may be taken into account in determining the institutionalized spouse's eligibility (*see,* 42 USC § 1396r-5 [c] [2]; § 1396r-5 [f] [2] [A]; Social Services Law § 366-c [2] [d]). If necessary, the entirety of the institutionalized spouse's assets will not be applied ***161** toward medical expenses, and support can be transferred to the spouse in order to bring her income up to the "minimum monthly maintenance needs allowance" (*see,* 42 USC § 1396r-5 [d] [3]; Social Services Law § 366-c [4] [b]). However, in order to receive an increased amount of support from the institutionalized spouse, the community spouse must show "special circumstances" at an administrative fair hearing (42 USC § 1396r-5 [e]; Social Services Law § 366-c [8] [a]).

Yet, both Federal and New York State law provide for the right of "spousal refusal" exercised by Mrs. Shah, which essentially permits avoidance of these resource allowance rules and limitations. The "spousal refusal" rule indicates that Medicaid must be provided to the institutionalized spouse who meets eligibility requirements even if the community spouse has income or resources in excess of the community spouse resource allowance, as long as the State may seek recovery of the cost of medical assistance from the community spouse (42 USC § 1396r-5 [c] [3]; Social Services Law § 366 [3] [a]). Furthermore, there is no look-back period with respect to a transfer of assets

between spouses for purposes of determining medical assistance eligibility (42 USC § 1396p [c] [2] [B] [i]; Social Services Law § 366 [5] [d] [3] [ii] [A]).

We hold that the interplay of these provisions allows an institutionalized spouse, through guardianship authorization, to transfer all of that spouse's assets to a community spouse; the latter may simultaneously refuse to have those assets included in the calculation of income and resources available to the institutionalized spouse for Medicaid assistance (*compare, Matter of John XX.,* 226 AD2d 79, *supra* [only a partial asset transfer was made by a guardian to the incapacitated person's children because the look-back period had to be taken into consideration]).

These New York Medicaid planning options may, as is apparently the case here, provide a technical and even potentially anomalous route that is the only pathway through which the incapacitated spouse could actually qualify for Medicaid. Especially considering these authorized policy choices, appellants' proposed strictures are simply not justified in either the Mental Hygiene Law or in the Federal or State Medicaid structures and are not problems of our legal cognizability.

Appellants further decry the dual standard that they see emanating from the Appellate Division decision. We disagree with this purported problem. A gift giver (regardless of whether ***162** the giver functions through a guardian) can desire to transfer far more than the statutory minimum to which a support seeker, relegated to a legal proceeding for obtaining the assets, is entitled (*compare, Matter of Gomprecht v Gomprecht,* 86 NY2d 47; *compare also, Matter of Golf v New York State Dept. of Social Servs.,* 91 NY2d 656). It is not the giving of the gift that alters the immediate accessibility for calculation purposes; it is the "spousal refusal" that temporarily blocks that governmental advantage. Indeed, it is appellants' position which advocates a different dual standard regarding how capable versus incapacitated persons would be treated for purposes of Medicaid planning. Their theory would also produce a disparity in how guardian community spouses who wish to exercise their legal right of "spousal refusal" would be treated in relation to their otherwise equally operative guardianship powers.

Moreover, as appellants acknowledge, the exercise of this right of "spousal refusal" does not deprive the State of all opportunity to seek recoupment from a financially qualified community spouse. It just requires a reimbursement process to obtain resources from the community spouse after Medicaid benefits are paid, instead of an initial calculation stage that might limit the amount of Medicaid benefits to be provided. We are not persuaded by DOH's dissatisfaction with the practical complications of its eventual recoupment option. Its objection offers an insufficient legal basis for determining that the methodology approved by the courts below is foreclosed.

Next, appellants rely significantly on language taken from this Court's *Gomprecht* decision, explaining that community spouses are not entitled to an "excessive" amount of income and resources while their spouses are institutionalized at Medicaid expense (*see, Matter of Gomprecht v Gomprecht, supra,* at 51). That case and that particular language are inapposite here.

Although they are opposite sides of the same coin, the instant dispute is less about the rights of the community spouse for purposes of support-mandated Medicaid calculations than it is about the rights of the institutionalized spouse to be the subject of Medicaid planning, which rights are plainly prescribed by the Mental Hygiene Law, after serious deliberation and enactment (*see,* Mental Hygiene Law §§ 81.01, 81.21; Mem of Assemblyman Koppell, 1992 NY Legis Ann, at 433-434). In this respect, we reiterate this cogent portion of Justice Bracken's opinion at the Appellate Division:

"The complexities [of the law] ... should never ***163** be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else for any reason or for no reason. ... We would only amplify this by saying that no agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment" (*Matter of [Kashmira] Shah,* 257 AD2d 275, 282-283, *supra*).

We have considered all of appellants' remaining arguments and conclude that they do not alter or affect the analyses and results we have reached in these companion cases.

Accordingly, the orders of the Appellate Division should be affirmed, with costs, in each appeal.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.

In each case: Order affirmed, with costs.*164

28 A.D.3d 485, 812 N.Y.S.2d 140, 2006 N.Y. Slip Op. 02549

**1 In the Matter of Ardelia R., Appellant. New York City Health and Hospital Corporation-Elmhurst Hospital Center, Respondent. Raymond M., Nonparty Appellant; Suanne Linder Chiacchiaro, Nonparty Respondent.

Supreme Court, Appellate Division, Second Department, New York
2004-06657, 7535/04
April 4, 2006

CITE TITLE AS: Matter of Ardelia R.

HEADNOTES

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for *486 Personal Needs or Property Management

Since record established that 82-year-old appellant lacked understanding or appreciation of nature and consequences of her functional limitations, finding that she was incapacitated person requiring guardian was proper notwithstanding lack of medical testimony regarding her medical condition.

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or Property Management

Independent guardian was properly appointed for appellant since appellant's family members were unsuitable—as there was evidence of undue influence in brother's actions to bring about execution of power of attorney and evidence of impropriety in brother's management of appellant's property, he was unsuitable to act as guardian; appellant's other two relatives were likewise unsuitable or unwilling to act as guardian.

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person and property of Ardelia R., an alleged incapacitated person, Ardelia R. and nonparty Raymond M. appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Thomas, J.), dated June 17, 2004, as, after a hearing, granted the petition, determined that Ardelia R. was an incapacitated person, and appointed Suanne Linder Chiacchiaro as guardian.

Ordered that the appeal by Raymond M. is dismissed, without costs or disbursements, as he is not aggrieved by the portion of the order and judgment appealed from (*see* CPLR 5511; *Hayden v Catholic Home Bur.*, 298 AD2d 557 [2002]); and it is further,

Ordered that the order and judgment is affirmed insofar as appealed from by the appellant Ardelia R., without costs or disbursements.**2

The appellant Ardelia R. is an 82-year-old woman who was found in her home by Protective Services for Adults without running water, food, electricity, or heat. When she presented to Elmhurst Hospital Center, she was malodorous and frail and, thereafter, she was diagnosed with dementia, hypertension, and coronary artery disease. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately $115,000 in savings, she was delinquent on her utility bills.

Based on these facts, the hearing record established by clear and convincing evidence that Ardelia R. lacked the understanding or appreciation of the nature and consequences of her functional limitations (*see* Mental Hygiene Law § 81.02 [b] [1], [2]). Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition (*see Matter of Rosa B.-S. [William M.B.]*, 1 AD3d 355, 356 [2003]; *Matter of Harriet R.*, 224 AD2d 625, 626 [1996]; *cf. Matter of Grinker [Rose]*, 77 NY2d 703, 711 [1991]; *Matter of Don* *487 *ald F.L.*, 210 AD2d 227, 228 [1994]; *Matter of Flowers [Dove]*, 197 AD2d 515 [1993]).

Moreover, the Supreme Court providently exercised its discretion in appointing an independent guardian since the record established that Ardelia R.'s family members were unsuitable (*see* Mental Hygiene Law § 81.19 [a] [1], [d]; *Matter of Joseph V.*, 307 AD2d 469, 471 [2003]). After admission to Elmhurst Hospital Center, Ardelia R.

executed a power of attorney in favor of her brother, the appellant Raymond M. The record demonstrates that Raymond M. told Ardelia R. to sign the document without reading it and, thereafter, withdrew funds from her bank accounts and failed to account for a substantial portion of those funds. As there was evidence of undue influence in Raymond M.'s actions to bring about the execution of the power of attorney (*see Matter of Maher,* 207 AD2d 133, 143 n [1994]) and evidence of impropriety in Raymond M.'s management of Ardelia R's property (*see Matter of Nora McL. C.* , 308 AD2d 445 [2003]; *Matter of Rochester Gen. Hosp. [Levin]*, 158 Misc 2d 522, 528 [1993]; *cf. Matter of Maher, supra* at 142-143), he was providently deemed unsuitable to act as guardian. Ardelia R.'s other two relatives were likewise unsuitable or unwilling to act as guardian. Accordingly, the Supreme Court properly appointed an independent guardian. Krausman, J.P., Spolzino, Lifson and Dillon, JJ., concur.

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